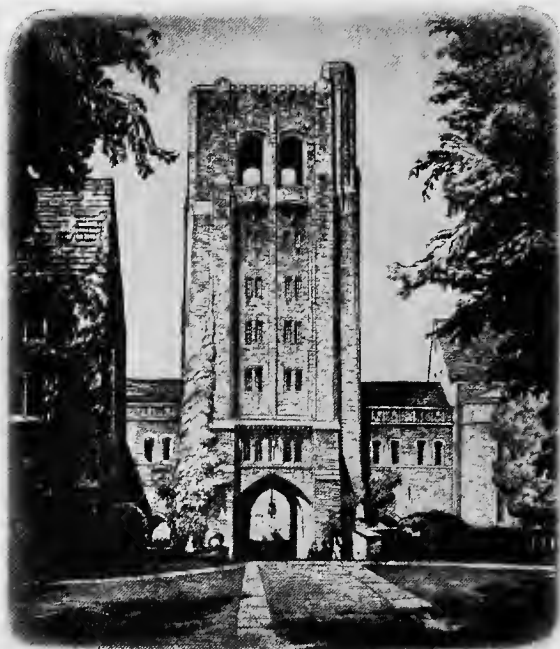


# THE SPIRIT OF OUR LAWS

HERMAN COHEN

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**THE  
SPIRIT OF OUR LAWS**

## PRESS NOTICES OF THE FIRST EDITION.

“ ‘The author believes that it is the only book in English which endeavours to describe in popular language for laymen the whole fabric of our legal institutions.’ We think the statement would be made more exact by reading ‘practice’ for ‘institutions,’ but subject to that amendment we think the author has not only made a laudable endeavour of which the difficulty can be realized only by those who have attempted something of the same kind themselves, and has made it in the right way, but has been to a great extent successful.”—*The Law Quarterly Review*.

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# THE SPIRIT OF OUR LAWS

BY

HERMAN COHEN

*of the Inner Temple, Barrister-at-Law*

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## Preface

THIS book is intended primarily "for the ease of the lay people" (see p. 31 thereof), otherwise known as "general" readers. Even the most precocious specialists come from that large class, and it is for the benefit of those intelligent persons (only) who desire or hope to desire a further acquaintance with "Law" that the references to reports of cases mentioned have been added. I believe that this is the only technicality for which I have to apologize; otherwise, except in quotations, there is, I hope, none. Consequently, law students—or any students—may, perhaps, find here a very first primer or friendly introduction to studies which they can easily make severer. Meanwhile, the writer has called in Literature's "artful aid" when he could.

He believes (as he did in the former edition, with the exception of one word,\* which he now adopts from a benevolent *Law Quarterly Reviewer*) that "this is the only book in English which endeavours to describe in popular language for laymen the whole fabric of our legal \*practice."

H. C.

JANUARY, 1922.



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# THE SPIRIT OF OUR LAWS

## Introduction

THERE is a story told that in the early days of arbitration, when its object was little understood, "Call that arbitration?" said a workman; "why, they give it agin me!" There seems to be very much the same sort of ignorance about the law among even "well-educated" people, and these pages are undertaken in the hope of dispelling a little of it.

A great many people take an interest in the law without being lawyers or litigants or specialists of any sort. They like to understand something of what is going on around them, and for their law they have to trust to snatches from the newspapers. Though, possibly, both writer and reader are "well-educated" persons, the exact point or points on which the report turns is almost certain to be missed, for neither has any training to catch it. Hence the frequent exclamation, "I can't understand this case; however could such a decision have been arrived at?" And, of course, the bewilderment is greater where there is any desire even to scratch beneath the surface. Yet between the formal study of the law and the perusal of the daily newspaper there is no satisfaction for the amateur reader, better, perhaps, known as "the general" reader. A professed lawyer, of course, would not dream of trusting an ordinary newspaper report (with a few exceptions) for practical purposes, even for his own guidance; for he requires at least a certain degree of accuracy, and may require the highest.

But looking only to the purposes of amusement, the fact is that too little is known of the principles of the law by journalists and their "clients" alike, to make what is written about it in the press—which, in the aggregate, is an immense mass—either really intelligible or enjoyable, to say nothing of its not being intellectually profitable.

It is easy to see the reason. It is because the law has no place in any of our systems of education. There is nothing to quarrel with in this. No one would suggest that in the ordinary sequence of our career in learning— dame's school or kindergarten, preparatory school, public school, university—the law should be a compulsory subject.<sup>1</sup> The broad, sound theory on which all these institutions are conducted is that the growing mind shall be equipped with an outfit which will best enable it to interpret the world before it to its own happiness, through the materials it collects for the needs and the graces of life. The learner, long before he is old enough to appreciate it, ought to be led on to enjoy truth and beauty as the most likely sources of happiness. First, the alphabet, then reading and writing, next arithmetic, are the media for supplying knowledge practically useful in itself, and at the same time a discipline for certain mental faculties. At a latter age, geography, history—at any rate, as it is called—grammar, geometry, repeat the process on another plane, and awaken or furbish other faculties as they ripen. As the time approaches when, in common belief, the character is formed, the schooling is deliberately given a special bent, and the last years of tutelage—generally the final stage before earning a living—are devoted to opportunity for study of some one

<sup>1</sup> There is, however, another view. In 1920 there appeared "An Elementary Commentary on the Laws of England," by Judge Rugg, K.C., *designed* for the use of schools.

whole world of thought; for centuries it was either classics or mathematics, now it is these and whatever else the universities propose. But throughout all these efforts and their combinations there runs one increasing purpose—Happiness. (The connection, by the way, between education as a daily system and happiness is too often forgotten. Thus the defence of a classical education in the eternal controversy ought to be based on the ground that, in the abstract, it offers the best chance of happiness in life.) If the boy at school, or the undergraduate at college, is in due course taught anything utilitarian, anything which he can later convert into cash by (for example) teaching others, this is (perhaps) an additional advantage, but not the chief, of the system. To read, to write, to cipher, to know a certain number of facts are among the minimum needs of bare existence, just as there must be a minimum of physical comfort to keep body and soul together, however noble that soul may be. Man, said Victor Hugo, is an ellipse with two foci, facts and ideas. But the object of education is moral and intellectual.

Where, then, in this scheme, is the place of the law? The answer is—nowhere, except exceptionally at the far end of it. The reason of this is simple. The early years of laying foundations must be devoted to the accumulation of elementary facts and powers, what might be called generically the acquisition of *technique*. Even the elements of music and fine art, which do not fare pedagogically much better than the law, cannot be wholly neglected, not because any one supposes that feeling and taste can be drilled into a learner, but because if those blessings are ever to be secured at all, there is an absolute necessity for some mechanical habit to be formed. But there is no such absolute necessity for imparting the rudiments of the law

thus early, for it is based on the sense of right and wrong, and this, it is assumed, is wafted, like a sunny breeze, to use Plato's phrase, into the child—nay, into the infant from all sides, at all times, in the hope of creating a faculty, or even an instinct. No child will ever learn to read or to play the piano unless he or she is taught the letters or the notes, and no child can grow up in any surroundings without a sense of right and wrong. By the time he has reached years of discretion he cannot analyse the sense from the law; they supply between them the obverse and converse of some of his ideas. But no one would suggest that, concurrently with his training at home in good conduct, there should be a training at school in the law, though it is not unreasonable that the tastes which are fostered in a cultivated family circle should be reinforced by lessons in, say, drawing and painting from his teacher. In short, children can and do grow up without the slightest appreciation of fine art, but they must, if of sound mind, know the object of the law.

It is only when we come to the university link in the educational chain that we find the law as part, so to say, of the stock-in-trade. And this is quite a modern innovation. For centuries only the classics and the mathematics were allowed to possess the essential qualification of a study to be in itself a "liberal education." It may be that that view was not wholly wrong; at any rate it has been superseded. But the old pre-eminence survives at least to this extent, that the best intellects are attracted by the service of the "humanities," which, in their turn, fashion the best intellects. Probably not one student in a hundred studies the law at the universities who does not destine himself to a legal career. In any case it cannot honestly be said that the law has a distinct place in our national system of



education. It may, as a severe study, contain every advantage of discipline and every seed of fertility, but, as a matter of fact, it stands as a thing apart, special and not much appreciated.

The law, as here used, cannot even be defined. It can, however, be exactly illustrated by a phrase of Thackeray's. He once said to a man, "Do you like the play?" to which the man replied, "I like to go to the theatre sometimes." "Bah!" said the other, "you don't even understand what I mean." What he meant is what is vulgarly called "The thing generally!" It is not the history nor the philosophy of the law, nor its form, nor its contents, still less the reform of it, nor is it the law as a profession, with which it is proposed to deal here particularly, though each conception may furnish topics here and there. It is rather as a great idea, as a system or institution which the modern mind cannot conceive as struck out from modern civilisation—if one word must be used, it is the spirit of our law, in the sense in which Montesquieu used the phrase and Blackstone so beautifully illustrated it, which it is proposed to convey in some measure. The greatness of these two names is indeed a reminder of the colossal possibilities of such a subject, but, at the same time, is an encouragement to follow humbly in their footsteps without thought of overtaking them.

And first, where does our law come from?

## 1. The Common Law

THE actual beginnings of a people are never seen. Their own records naturally date from a period when the civilisation of the nation has reached a certain stage; when, at the most, there are floating traditions or memories of the past which can be written down. As a matter of fact, this is

the common type of history. But it does happen sometimes that skilled observers of another race or country preserve the spectacle of the early state of tribes or people which afterwards showed, or perhaps are showing, great developments. A familiar instance is Julius Cæsar's account of the Gauls or the Britons; in our own day we have seen the Japanese take strides forward. But here, too, when the recorder comes upon the scene, there is already a definitely formed character to record; it is not so definite as we know it in later historic times, but it is represented as uniform and symmetrical. We are as certain as we are that there was a battle of Waterloo, that there was a time when the Ionians and the Dorians were pouring or filtering into ancient Greece from Asia, though no contemporary witness has told us of the process; if we knew more of them at this stage, we should have an invaluable key of much subsequent history. It is rare that the origin of a nation is traced step by step to one person; but we have this in the Old Testament. This would seem to be a peculiarly good opportunity to catch the manners living as they rise, but, in the first place, the most delicate stage, so to say, the growth from a family to a people, is missing—it drops out between Genesis and Exodus; and, in the second, we are not minutely instructed under what influences Father Abraham's character was formed. In any case, in the individual race and in the individual child, there is an undifferentiated background from which no stray memory survives. It is in this area of time that the germs of character are deposited, and it is to this period that we must look for the meaning of the Common Law.

The primitive stock of a race never seems quite to wear out, however widely the modern product may differ, from its "rude forefathers." The Hebrew, the Hellene, the

Roman, all clearly retain in their historical characteristics something from what by comparison may be called their savage state. The Spaniard's ancestors, the Iberians, were remarkable for their cruelty; the Germans are the descendants of stolid tribes; the Gauls were brave, impetuous, pleasure-loving; the Saxons loved liberty. Wherever the initial impulse or tendency came from, however the breed became a fixed species, bodies of men, very much like one another in many ways, do appear on the face of the earth, while the men of one body differ very much from the men of another. No group, it seems, however savage, has yet been discovered without some distinguishing mark from dumb animals. There is always some sign of thought, some trace of character. In the dark ages of growth, the future of the race is determined by its habits and customs. These, of course, depend on its necessities. To take a simple instance, those who live by the sea notoriously differ from those who live by the land. And the primeval daily struggles and toils for self-preservation are peculiarly apt to leave their traces in the mature temperament or disposition. The books of the anthropologists are full of illustrations of such facts. The most famous expression of the theory is that universally known as Evolution, the continuous progress in activities which preserve or improve life. It is obvious that, with time, habits and customs of all sorts must spring up. It is commonly supposed that one of the most certain habits of primitive man was that the physically weaker should be subject to the physically stronger; it is merely a guess from the analogy of the other animals, but it is likely enough. But it is worth noting that the will of the stronger could not be imposed in defiance of prevailing customs, for all members of the community alike would be subject—and servilely subject—to their

domination; the reformer running deliberately counter to popular prejudice or superstition is a distinctly later phenomenon. Primitive man would be unable even to conceive his world except as he knew it, so that even if he is regarded as a fully fledged lawgiver—a long step forward—the only law he could give would be nothing but the echo of the usages to which he was accustomed. So it is a commonplace observation that autocrats like Tsars or Sultans can not abruptly change the national habits, if they would; it is only within that circle that they are all-powerful: their ignorant subjects would not be able to understand great artificial changes, and the decrees would be dead letters. (See p. 45.)

No doubt the inveterate habits of peoples are abruptly changed, as by the wholesale conversions of a conquering Mahomet, or the suppression of the Juggernaut by the British; but these are cases of sheer compulsion by external force. Gradual change of character from within is very, very slow, and perhaps the old stock of primeval dispositions is never exhausted.

This hypothesis really comes to this. When first nations come upon the scene there is something which they obey, whether it be the raw will of some one person—however indicated, whether as a leader in past emergencies or one who had imposed himself as a superior on unwilling inferiors—or a made-up law in the modern sense, rudimentary indeed, but still a distinct piece of manufacture. At any rate, there is some permanent institution implying a sense of what is permitted and what is not permitted, or of what is commanded to be done, something like a public conscience. At a very early stage the Greeks recognised the proverb that Custom is king of everything, and, as a matter of fact, in their language the word for law originally meant custom.

The common law, then, is all—up to a certain time—that a race thinks people ought or ought not to do. What that time is it is impossible to define accurately, because it is impossible to say at what precise moment a nation emerges from barbarism into civilisation, or becomes so comparatively civilised that it can be said to have any law at all. However, the question of time is only of consequence because it is usual to think, if not to speak, of the Common Law as a body of principles and rules from “time immemorial” now complete and not to be added to. Roughly, the truth is that after laws begin to be written down regularly—that is, when a distinct measure of civilisation has been attained—the written law makes so great an impression on people that the unwritten gets itself supposed—if such an expression may be used—to date from before the first formal legislation. And so it must in a sense, for the Common Law is the expression of the people’s mind and character, as it were, and those are made up when the moment of self-recognition arrives. But the contents of the Common Law need not be published or expressed till, so to say, yesterday. For it is conceivable that no necessity may ever have before arisen to publish or express some ordinance or prohibition which may have existed from time immemorial. But such cases are of little practical importance. For practical purposes we may consider the Common Law to date from the infancy and the youth of the nation.

Let us apply all this to our own country. Very early the rule got itself established that, normally, human life must not be taken. Yet you will nowhere find a distinct law, “Thou shalt not murder”; nor till 1828 was it written down that the murderer should be put to death. 24-25 Vict. c. 100, sec. 1, is, “Whosoever shall be convicted of

murder, shall suffer death as a felon"; but this is obviously only a convenient way of stating the common law of centuries. So with the prohibition, "Thou shalt not steal," there is no statute which makes this simple statement, and for centuries there was none which regulated the punishment for stealing. At the Conquest, we are told, the custom which now only survives in Kent—that all the sons inherit land alike—was universal throughout the country. The Normans introduced primogeniture, a feudal custom, but left the old system in Kent (as a special favour, the story goes, for the men of that county having done William a great service). At any rate, the common law of both the larger and the smaller area exists to-day. Or again, take the relation of husband and wife. In the first place, at all times, so far as we know, monogamy was the rule; polygamy is not expressly prohibited in a statute till 1603. In course of time, too, the rights of a husband over a wife became more or less defined. It is, perhaps, not too much to say that for centuries it was generally believed that the man was so far the master of the woman that he had the right to chastise her moderately by way of correction, and, *prima facie*, there was nothing unreasonable in such belief. For in an early and incomplete state of civilisation such a custom was quite likely to establish itself. But in a notorious case<sup>1</sup> in 1891, a judge declared that the common law had never conferred any such power on the man, and that such was not the law of this country (and the Lord Chancellor nearly went as far). Their lordships were, no doubt, right; but the instance peculiarly illustrates how the common law was supposed to be old custom of the masses solidified. Again, concurrently with progress, locomotion, of course, developes, and necessary customs

<sup>1</sup> *The Queen v. Jackson*, 1891, 1 Q.B. 682.

inevitably spring up. When railways revolutionised the people's going to and fro, there was a large and well-settled body of common laws regulating the duties of authorities, carriers, and others having to do with the roads. When these were superseded by the iron tracks, the common law of highways applied to the latter so far as possible; the fresh conditions arising from the new inventions being met by special new laws, where the common law did not speak. Finally, there might exist a common law among a group, as, for instance, among merchants whose business and habits produced customs special to themselves. When, in course of time, some of these were adopted in everyday life, and became sufficiently prominent to make it worth while determining by what authority they were valid, the law merchant, as it was called, was held to be part of the common law. Thus, the extremely common practice of passing away the right to a sum of money by writing one's name on the back of a bit of paper was originally part of the common law of merchants.

It is, therefore, easy to see at a glance the meaning of the great—constitutional, as it is called—principle which has been of such immense practical importance in the United States and other colonies: that colonists from this country who settle a new land within the dominions of the Crown take the common law with them. It only means that those of the people who emigrate in that way take with them the character of that people; and that, in the absence of anything binding them to the contrary, they are taken to agree to the traditional habits and observances to which they have been accustomed, as naturally expressing their own characteristics. They are as free to alter such rules in their altered circumstances, or, generally, to deal with an unforeseen situation by drawing anew on the common law,

as are the bulk of the people whom they have left at home. If any further illustration of the immediate source of the common law being the fund of the national character is helpful, it may, perhaps, be shown thus. It is commonly said<sup>1</sup> that it is an axiom in France that an accused person is deemed guilty till he is proved to be innocent. The English rule, it is certain, is the reverse, viz. that any one charged with an offence against the law must, for all purposes, be regarded as innocent of the charge until he is convicted of it by law. Thus, in 1823, a theatre proprietor was punished<sup>2</sup> for assuming in a stage representation before conviction the guilt of a man charged with a murder, for which he was afterwards hanged. The (supposed) French and the English views, being diametrically opposed, naturally have seriously different consequences in practice in such a case and generally. Yet each springs directly from the national bent of mind and character.

How the common law is invoked to meet fresh emergencies we shall understand when we see how it is expressed, and to that we will now turn.

## 2. The Depositories of the Common Law

These are the judges. The origin of the office is lost in antiquity, like other origins.<sup>3</sup> But it may be assumed that the primitive judge would be a fair representative in intelligence and character generally of his people. When

<sup>1</sup> The truth, however, seems to be: "It is unfair to say that, in France, a prisoner is guilty until he has been proved to be innocent; but it is true to say that the French system fosters prejudice against the prisoner."—*The French Law of Evidence*, by O. Bodington, p. 105, 1904.

<sup>2</sup> *R. v. Williams and Rumsey*, 26 R.R. 624.

<sup>3</sup> Our forensic system practically descends from Norman times.



with deliberate choice by some one, later on, something like a system was evolved, the "elders," with whom we are familiar in Scripture, naturally were frequently called to the office. Men of experience—that is, age—would be enough for the work so long as no definite professional knowledge was needed and no professional organization existed. The important point to notice is, that whoever acted as what we now call a judge, must be of the people, must always have lived among them, and must reproduce in himself their ways of thinking. When the only question was, What is the right thing to do in the given circumstances? he could answer it as well as any one else; if he had authority of any sort, his view of what ought to be done at any time might set the standard for those under his influence. With the express power of deciding disputes or of awarding retribution—the latter, no doubt, his common function—his duty would be hourly to apply those principles which he had learned like his neighbours, and which he no more questioned than they did. We know that among some ancient tribes there was a regular tariff for, say, murder: so many oxen or sheep for a father, so many for a husband, so many for a brother, and so on. All this would be common knowledge, and the primitive judge would only declare what every bystander would have said as a matter of course. More difficult cases would soon multiply if the society made any progress, but this must have been the prototype of the judicial office. The judges were the men who enjoyed the reputation of knowing what their people thought right and wrong, and they have never lost it.<sup>1</sup> When James I.

<sup>1</sup> "What forms good supreme judges? Considerable professional practice, high position, wise and watchful brethren to advise and to check, a vigorous bar, a jealous observance of the public, a responsibility to Parliament and the Crown, great reputation or great disgrace [*sic*], ignorance of who or what parties are."—*Ld. Cockburn, a Scots Judge*, 2 *Journal*, Aug. 31, 1853.

asked Ld. Coke a question of law, he desired to know whether it was one of common law or statute law—because, he said, if it were one of common law he could answer it in bed; but if it were one of statute law he must get up and examine the statutes.<sup>1</sup>

To this day, when codes and statutes do not provide for a case, those who have to decide it must fall back on the sense of right and wrong which they share with the rest of the people—on what we now call general principles of morality. In other words, the judges declare the common law. In course of time much of it has been written down. Most laws, as everybody knows, are now written in Acts of Parliament, and to that system of law-making we must now turn. We shall find that the primitive system survives alongside the Parliamentary system in the name and nature of the Common Law Courts.

### 3. Laws Written and Published

When was this country sufficiently advanced to have written laws? Its history begins with the account of Julius Cæsar, who invaded it in 55 B.C., though it is mentioned, perhaps, by Herodotus (about 450 B.C.), and certainly by Aristotle (about 330 B.C.). Cæsar does not hint at written laws. Taking the accepted chronology, we find in a book of authority, “c. 600 (A.D.) Ethelbert issues the first English laws that have come down to us” (Acland and Ransome’s *English Political History*). Turning to an account of this English king in the *Dictionary of National Biography*, we read: “Before [St.] Augustine died (604), Æthelbert, with the advice of his Witan, published

<sup>1</sup> “It is impossible to know all the statutory law, and not very possible to know all the common law.”—Scrutton, L. J., *Cambridge Law Journal* 19: 1921.

a body of written dooms or laws 'according to the Roman fashion'; this code, which was thus a result of the king's conversion [to Christianity], contains ninety laws, chiefly dictating the pecuniary amends to be made for every kind and degree of injury, and beginning with the amounts to be paid for injuring the property of the church or the clergy." Scholars, then, have settled it that practically the first legislation in our modern sense took place about thirteen hundred years ago. The code in question, we may be sure, chiefly declared the existing law, as we should now say, and did not mean to make new law, and it is put forth by the sovereign's authority.

But it is a law of nature, that as a people makes progress in civilisation it becomes more and more susceptible of the influence of other races with which it comes into contact, and so now and hereafter we must remember what Blackstone said (1765): "The truth seems to be that there never was any formal exchange of one system of laws for another, though doubtless by the intermixture of adventitious nations, the Romans, the Picts, the Saxons, the Danes, and the Normans, they must have insensibly introduced and incorporated many of their own *customs* with those that were before established, thereby in all probability improving the texture and wisdom of the whole by the accumulated wisdom of divers particular countries. Our laws, saith Lord Bacon, are mixed as our language; and as our language is so much the richer, the laws are the more complete.

"And, indeed, our antiquaries and early historians do all positively assure us that our body of laws is of this compounded nature. For they tell us that in the time of Alfred, the local customs of the several provinces of the kingdom were grown so various that he found it convenient

to compile his *dome-book*, or *Liber Judicialis*, for the general use of the whole kingdom."

Now King Alfred's time (900 A.D.) is popularly believed to be so important a moment in the history of English law-making, that it is worth while to look more particularly into what an authority says about it. "It does not appear," says Professor Freeman, "that Ælfred was the author of any formal legal or constitutional changes. In his legislation his tone is one of singular modesty. 'He did not dare to set down much of his own in writ, for he did not know how it would like them that came after.' He speaks of himself as simply choosing the best among the laws of earlier kings, and as doing all that he did with the consent of the Witan. . . . What is specially characteristic of Ælfred's laws is their intensely religious character. The body of them, like other Christian Teutonic codes, is simply the old Teutonic law, with such changes . . . as the introduction of Christianity made needful. What is peculiar to Ælfred's code is the long scriptural introduction beginning with the Ten Commandments. The Hebrew Law is here treated very much as an earlier Teutonic code might have been. Ælfred commonly shows a thorough knowledge of the institutions and traditions of his own people." (*Dictionary of National Biography*.) Note this last sentence. It is a reminder that when the day of written codes arrives, the bulk of them consists of the laws actually in force and generally popular at the moment. The early legislator neither has the power nor the desire to change the laws, i.e. to make violent or serious changes in the habits of the people (nor, indeed, does any legislator at any time, unless he is driven to it). And note, too, how it appears from the above extracts (for which reason, indeed, they are given) that the written law of another and a

foreign people may have the deepest influence on the common law, almost without those subject to it knowing it. For the Romans when they ruled in this island had long had a huge system of written laws, and the Christian missionaries had the Bible, in which there are many codes of laws—to say nothing of the other races mentioned by Blackstone; and it is certain that the life of the tribes, if it is too early to speak of the national life, must have been profoundly modified by these visitors or settlers with these famous codes. In other words, the Roman occupation and the Christian propaganda insensibly educated the natives in civilisation. Thus all legislation, whether ready-made like the Latin Institutes, or the Hebrew and Greek Scriptures, or deliberate like Ethelbert's and Alfred's, affects the common law at any given moment as much as it does statutes. But we are still a very long way off the modern system of statutes as we know it—i.e. a machinery ready to adapt the laws to any new set of circumstances as they arise.

The history of the growth of Parliament is a special study. If we turn to the great edition of the Statutes of the Realm (1810), the first statute printed is that of the twentieth year of Henry IV., 1235-6 (called the Provision of Merton). But these statutes are preceded by Charters of Liberties, beginning with one in the first year of Henry I., 1101, and ending with one in the twenty-ninth year of Edward I., 1300-1, and including the famous Magna Charta of the seventeenth year of John, 1215.

We are so thoroughly accustomed to the practice and incidents of daily legislation, that we are apt to forget that at one time the making of a new law was a great national event. In particular, schoolboys and girls learning English history are, I think, apt to wonder why such an undue

prominence is given to an event such as, say, the Great Charter, which only provides such elementary matters as that no one is to be imprisoned without due process of law, no one is to be taxed arbitrarily by the King, etc.—things that, we all know nowadays, are never done. It is not, perhaps, impressed sufficiently on learners how rare this sort of writing down law or “promulgating” was, and how very slowly the present system of Parliament grew up.

Just a word about this, though, strictly, it is beyond our scope. According to Acland and Ransome’s *Handbook of the Political History of England*, there took place in 1213, “August 4th, First united representation of townships on the royal demesne; four men and the reeve are summoned from each township to the assembly at St. Albans called to estimate the damage due to the bishops, and for other business”; and Bishop Stubbs is cited as calling this “the first representative assembly on record.” The word “Parliament” first appears in this book in the year 1244 (in the language a little earlier), when we are told “*The earls, barons, and bishops . . . meet in Parliament and demand control over the appointment of ministers.* Similar demands and complaints are made by Parliaments in following years.” In 1254 occurs “First summons to Parliament by royal writ of two knights of the shire.” In 1265 “a Parliament meets, to which are summoned two knights from each county, and for the first time representatives from cities and boroughs.” Finally, in 1295, “is the First Complete and Model Parliament of The Three Estates.”<sup>1</sup>

<sup>1</sup> The Lords Spiritual, the Lords Temporal, and the Commons, or, more accurately, the clergy, the nobility, and the commons. “The estate of the clergy is still in theory represented in both Houses, but, as regards the Lower House, this representation has been a mere fiction for centuries” (*Encyclopædia of the Laws of England*). “It is found very difficult to induce the clergy to attend as an Estate in

"Besides the barons and prelates, one proctor is summoned for the clergy of each cathedral and two for the clergy of each diocese, two knights from each shire, two citizens from each city and two burgesses from each borough" (*ibid.*, Summaries: Parliament).

We are still a long way off Parliament as we know it—not only in function, but in form. "In the reign," says Mr. Carter (*History of English Legal Institutions*, 1906, p. 74), "of Edward I., a new body makes its appearance under the name of the Parliament,<sup>1</sup> and we have the record of the Parliament of 1305, published in the Rolls Series with an introduction by Professor Maitland. . . . It was a full Parliament; the three estates of the realm met the King and his Council, in all about six hundred men. There were thirty-three members of the King's Council, to whom, though not prelates or barons, writs were sent, and others were summoned to advise the King from their special acquaintance with Scotch and Gascon affairs." The thirty-three "included the Chancellor of the Exchequer, the Justices of the two Benches, the Barons of the Exchequer, several "itinerants," and thirteen clerks of the Chancery. The Chancery was the great secretarial department, and did the king's writing, foreign and domestic. . . . These thirty-three men represented the legal, official, and administrative talent of the country." "The business which was done in this Parliament was (1) the discussion of foreign affairs, Scotch and Gascon, (2) legislation, (3) taxation, (4) audience of petitions, (5) judicial business, criminal and civil." But at this time, says Professor Maitland,

Parliament, and from the middle of the fourteenth century their grants are made as a rule in Convocation" (Acland and Ransome, 1295, A.D.).

<sup>1</sup> The word (in French) first appears in a statute in 1275 (Blackstone).

"a Parliament is *rather an act than a body of persons*. . . . It is but slowly that this word is appropriated to colloquies of a particular kind, namely, those which the King has with the estates of his realm, and still more slowly that it is transferred from the colloquy to the body of men whom the King has summoned. As yet, any meeting of the King's Council that has been solemnly summoned for general business seems to be a Parliament." And he adds (to use Mr. Carter's summary), "The petitions were not for anything like legislation, but for things which the King could legally grant either for justice or for grace. The answers were mainly remissions of the questions to those persons or courts which had proper cognisance of such things." The insignificance of the Commons in all this must strike the most casual reader.

Bearing in mind, then, the totally different aspect of a law-giver, maker, or promoter, and (it must be added) a court of law, in the infancy of Parliament and now, we may still say that there has been an uninterrupted stream of statutes from 1235 to the present day.

To the modern relation between Parliament and the laws we must now turn.

## 4. Statute Law

Delolme says, "It is a fundamental principle with the English lawyers that Parliament can do everything, except make a woman<sup>1</sup> a man or a man a woman" (*The Constitution*

<sup>1</sup> It was said jestingly even to have done this, when, in 1850, it enacted "words importing the masculine gender shall be deemed and taken to include females" (An Act for shortening the Language used in Acts of Parliament, c. 21, sec. 4). In *Crow v. Ramsey*; *T. Jones* 12 (before 1674) Vaughan, C. J., said, as an extreme case, Parliament "may make a woman Mayor or Justice of Peace, for they are the



of *England*, Book I., ch. x.—not in all editions), i.e. it can “do everything that is not naturally impossible” (Blackstone). For instance, it (i.e. the King and the two Houses together) could turn the government into a republic or anything else. In the oft-quoted words of Coke, “its power is so transcendent and absolute as it cannot be confined either for causes or persons within any bounds.” Sir Erskine May may also be quoted. “Unlike the legislatures of many other countries,” ours “is bound by no fundamental charter or constitution, but has itself the sole constitutional right of establishing and altering the laws and government of the empire” (*Parliamentary Practice*, p. 44, 1917). The empire, of course, is the limit of its jurisdiction, but in regard of certain grave crimes (e.g. treason, murder—not only of a fellow subject—bigamy), the empire means British subjects anywhere. Parliament does not assume to legislate for foreigners in foreign countries (including foreign ships on the high seas). Nevertheless, it may be that here and there, in non-Christian or semi-civilised countries, or in protectorates where there is not a settled government, or a satisfactory one in our view, and where the Crown has obtained a certain jurisdiction, Parliament, by regulating that jurisdiction, as it has done, has legislated for foreigners in a foreign land. Still, this is exceptional; in the ordinary way, the remedy or revenge for wrongs done to the King’s subjects in foreign countries is through the regular means those countries provide by their laws or, failing those, extraordinarily, through our Secretary of State for Foreign Affairs, who will act according to Treaties

creatures of men, but it cannot alter the course of nature!” See p. 37 n.<sup>2</sup>. In view of recent innovations Tony Lumpkin’s hyperbole “if you mind him he’ll persuade you that his mother was an alderman and his aunt a justice of peace” (*She Stoops to Conquer*, Act I., 1773) has lost its point.

or the Law of Nations.<sup>1</sup> The persons or property of foreigners within the King's dominions are, of course, under the British law applicable to them.<sup>2</sup> In the case of his *own* subjects doing wrong abroad, the value of the power to try them within his dominions obviously depends on finding them there.

How Parliament gradually got these ample powers is part of the history of the country, and not our theme here. Now that it can make any law<sup>3</sup> it must do it in the form of a statute, and it has chosen to make three classes of statutes—public, local and personal, and private Acts. Every word of every one of these has equally to be passed by the King, Lords and Commons. The distinction between them in dealing with them arises from the difference of the state's interest in them.

A public bill is, or ought to be, concerned with matter of national interest—reform, education, Ireland, and what

<sup>1</sup> A body of law accepted by all civilised nations and dealing mainly with the relations of states at war and the sovereignty of states. A state thus recognising "international" law makes it its own law.

<sup>2</sup> Laws, specially applicable to foreigners, are inconsiderable at home; in some colonies those relating to foreign labourers are important. The exemption of foreign sovereigns and ambassadors is no exception, for it is our law which exempts them.

<sup>3</sup> A resolution of either House, not being illegal, about the internal affairs or conduct of that House is a law, binding on its members, though it is not generally so called. The expulsion of a member of the House of Commons is an extreme instance of the regulation of its internal affairs by the House; the legality of expulsion has never been expressly tested in a court of law. Sir William Anson says the resolution "amounts to no more than an expression of opinion that the person expelled is unfit to be a member of the House." (*The Constitution*, Vol. I., c. iv. s.4 § 3.) It is admitted that the expelled person may be re-elected. "It is certainly true that a resolution of the House of Commons cannot alter the law. . . . I do not say that the resolution of the House is the judgment of a Court not subject to our revision; but it has much in common with such a

not? Parliament in discussing it must inform itself from whatever source it can, by debate or through a committee. In such cases the representatives of the people reflect the people. Every view, at any rate of the principles (if not of the details) in question, has a good chance, for all practical purposes the certainty, of being considered. This is mere newspaper knowledge. Such "public general" bills—their technical name—are printed at every stage of their progress.

Local and personal Acts deal with matters of special interest to certain persons or places, and confer powers or authority which either require the consent of Parliament or can be much more effectually obtained with that consent. Railways Acts are of this class, and so are many others; creating or facilitating other great industrial or municipal undertakings and other enterprises. Some of these, though of immense importance, only concern particular places or groups of persons. For instance, the great London Building

judgment. The House of Commons is not a Court of Justice; but the effect of its privilege to regulate its own internal concerns practically invests it with a judicial character when it has to apply to particular cases the provisions of Acts. . . . If its determination is not in accordance with law, this resembles the case of an error by a judge whose decision is not subject to appeal. There is nothing startling in the recognition of the fact that such an error is possible. If, for instance, a jury in a criminal case give a perverse verdict, the law has provided no remedy. The maxim that there is no wrong without a remedy does not mean, as it is sometimes supposed, that there is a legal remedy for every moral or political wrong. If this were its meaning, it would be manifestly untrue. There is no legal remedy for the breach of a solemn promise not under seal and made without consideration; nor for many kinds of verbal slander, though each may involve utter ruin; nor for oppressive legislation, though it may reduce men practically to slavery; nor for the worst damage to person and property inflicted by the most unjust and cruel war. The maxim means only that legal wrong and legal remedy are correlative terms; and it would be more intelligibly and correctly stated, if it were reversed, so as to stand 'where there is no legal remedy, there is no legal wrong' (Stephen J. in *Bradlaugh v. Gosset*, 12 Q. B. D. 284, in 1884). (Cf. p. 43).

Act of 1894 (57-8 Vict. c. ccxiii., amended 61-2 V. c. cxxxvii.) is a local statute; it extends "to London and no further" (sec. 4). Personal bills are estate, divorce, naturalisation, name, and "other bills not specified as Local" (Erskine May); thus some are naturally called private. For all these purposes there is an elaborate machinery of committees of either House or of joint committees of both Houses to consider the proposed measures. All interested parties can be heard before these committees, and there is a Parliamentary Bar devoted to practising before them, and a staff of officials to attend them. It is obvious that in estate bills for settling the complicated affairs of great estates, or in divorce bills, which dissolve marriages (now only in Ireland, where the courts of law have no power to do so in deference to the Catholic religion), these committees act as judges, and consequently their procedure is regulated by rules as rigid as those the judges enforce. These tribunals are better fitted to deal with these questions of detail than either House itself, and the bill, which is ultimately presented as the result of their deliberations (if it is presented), is in effect their report to the House on the matter referred to them—a report which, of course, the House may deal with as with any other bill, but which it almost invariably accepts. Nearly all local Acts are printed,<sup>f</sup> including Inclosure and Drainage Acts, of which there are a good many. Some strictly private Acts are printed, and some are not; it is a question of convenience. Private Acts of divorce and naturalisation, each affecting very few persons, are not printed; but a copy can be obtained at the proper office. There is a set of rules for distributing the committee work of this sort between the two Houses, with a view of saving time; but the principle is preserved that nothing becomes an Act of Parliament

until the three constituents have concurred in it in a formal way. It is perhaps needless to say that every Act passed is carefully recorded by the proper officers.

The actual composition or drafting of a bill brought into either House is a matter of much importance, and even the verbal changes which it undergoes in its passage must be vigilantly watched. In 1812 it was enacted that penalties under an Act (c. 146) were to go half to the informer and half to the poor of the parish, but the only penalty under the Act is fourteen years' transportation. An incorrect version is that the words ultimately ran—"fourteen years' transportation, and that upon conviction, one-half thereof should go to the King and one-half to the informer." There is a story that in a bill for the improvement of the metropolitan watch in the time of George III., there was a clause that the watchmen should "be compelled to sleep" during the day. A member of the House of Commons, who suffered from gout, proposed that it should be extended to members of that House.

However simple or short an enactment may purport to be, the authors will almost certainly require trained assistance, for only a professional lawyer can suggest the points where it may modify or conflict with the existing law, and if the measure is long, and at all complicated, it is certain to come into contact with existing statutes somewhere. The Government, of course, has a staff of professional draftsmen at its disposal, but it does not, nevertheless, always make its meaning clear, or avoid conflict with other laws.<sup>1</sup> Hence the frequent comments we read in

<sup>1</sup> Perhaps the most extraordinary instance of a draftsman's blunder is the statement in the Extradition Act (1870) Amendment Act, 1873, sec. 3: "Whereas a person who is accessory before or after the fact . . . is by English law liable to be tried and punished as if he were the principal offender." An accessory after the fact is,

the newspapers. As Lord Thring, who had very great experience in drafting Government bills, puts it "when the bill has become law, it will have to run the gauntlet of the judicial bench, whose ermined dignitaries delight in pointing out the shortcomings of the legislature in approving such an imperfect performance" (*Practical Legislation*, p. 9). For instance, the Workmen's Compensation Act of 1897 was notoriously and continuously the subject of such criticism and was repealed in 1906. The fact is that no foresight can foresee everything: cases occur in which the facts will not square wholly with one principle or provision of a statute, but partly with one, partly with another; or which no one had thought of when the bill was designed, drafted, debated, or passed. Hence has arisen the science of the interpretation of statutes. Of this something must be said to illustrate the practical difficulties of understanding the words as they leave the draftsman, or, it may be, the language of some individual member of either House. But before quitting the former, two implements of his stock-in-trade may be explained.

"Codification," says Lord Thring, "is the reduction into a systematic form of the whole of the law relating to a given subject, that is to say, of the common law, the case law, and the statute law; while consolidation differs from codifi-

of course, nothing of the sort, or everyone who screened a murderer would be liable to be hanged. On ss. 30 and 31 of the Wills Act, 1837, Messrs. Underhill and Strahan say, "Strange and almost incredible as it may appear, it is believed that the real history of the two sections is that they were drafted as alternative sections, but by some carelessness were both allowed to remain in the Act when passed" (*Wills and Settlements*, 1906, p. 249). Owing to a misprint "prisoner" in the Criminal Lunatics Act, 1884, became "person," and was copied into the (Irish) Lunacy Act, 1901: *Law Times*, July 29, 1916, p. 237.

cation<sup>1</sup> in this alone, that it omits the common law, and comprises only the statute law relating to a subject, as illustrated or explained by judicial decisions."

Instances of consolidation are the Customs Laws Consolidation Act of 1876, the County Courts Act, 1888, the Stamp Act of 1891, the Sheriffs Act of 1887, the huge Merchant Shipping Act of 1894 (748 sections *plus* 22 schedules, 292 pages, royal octavo, probably the longest Act ever passed)<sup>2</sup> the Post Office, the Children ("to amend" as well), the Companies Acts, 1908, and the Bankruptcy Act, 1914. Some of these statutes are said to be strictly consolidating, "purely literary" (Hardcastle), i.e. they collect in one pigeon hole, so to say, exact copies of all the scattered enactments on one subject, destroying the originals by repeal. Such a proceeding is, of course, a great saving of time and convenience both in domestic and legislative affairs. Theoretically, there is nothing but a removal; instead of looking for a thing in one place, you look in another. But practically this process always means rearrangement to some extent, and thus consolidation lets in a small new element. This is so, even if there are no judicial decisions on the separate Acts, or if they have already had their effect in the tributary streams merging and mingling in the main Act. But where judges have decided cases on sections and words of the constituent Acts, i.e. have interpreted or construed them judicially, it

<sup>1</sup> "Mr. Prin [Prynne] . . . did discourse with me . . . about the laws of England telling me the many faults in them; and among others, their obscurity through multitude of long statutes, which he is about to abstract out of all of a sort; and as he lives and Parliaments come, get them put into laws and the other statutes repealed and then it will be a short work to know the law, which appears a very noble good thing."—Pepys, Ap. 25, 1666.

<sup>2</sup> The Municipal Corporations Act, 1882, is our "best specimen." Dicey, *Law and Opinion in England*, Lect. II., 1906.

would be waste of time to ignore those decisions, so they are either distinctly incorporated in or distinctly excluded from the consolidating statute. Still, it does not purport to enact anything new, and seldom does so; but from time to time it becomes important later, in order to do justice, to know whether such an Act intended or not to alter the law, however slightly, or merely intended to declare what it was.

Of codification, Lord Thring says, "It may be stated at once that nothing has been done, or perhaps can be done, towards any systematic codification of English law"; but this is hardly accurate. It is, perhaps, a question of words, but it is generally understood that there are a few codifying Acts, viz. Bills of Exchange (1882), Partnership (1890), and Sale of Goods (1893), the first and last and that on Marine Insurance (1906) drafted by Sir M. D. Chalmers. Perjury, Forgery and Larceny were similarly treated in 1911, 1913 and 1916 respectively. Now, in the case of the first of these we can see the work getting on, as it were, under a microscope supplied by the workman, and a glimpse brings home the situation in a most interesting way. "Bills, notes, and cheques," said Mr. Chalmers, in the Introduction to the third edition (1887) of his *Digest* (Bills of Exchange), "seemed to form a well-isolated subject, and I therefore set to work to prepare a digest of the law relating to them. I found that the law was contained in some 2500 cases and 17 statutory enactments. I read through the whole of the decisions, beginning with the first reported case in 1603. But the cases on the subject were comparatively few and unimportant until the time of Lord Mansfield [about 1760]. The general principles of the law were then settled, and subsequent decisions, though very numerous, have been for the most part illustrations of, or deductions from, the general propositions then laid



down. On some points there was a curious dearth of authority. As regards such points I had recourse to American decisions, and to inquiry about the usages among bankers and merchants. As the result, a good many propositions in the *Digest* [1878], even on points of frequent occurrence, had to be stated with a (probably) or a (perhaps)." Then the Institute of Bankers and the Associated Chambers of Commerce gave their assistance, and ultimately Scots law was conciliated, and the bill extended to Scotland. A strong committee of merchants, bankers, and lawyers of the House of Commons "heckled" it, and it presently became the Bills of Exchange Act, 1882. No other such account by a draftsman how legislatively the trick is done, if that expression may be pardoned, seems to be known. It is worth while to add a few more of his remarks. "The Act has now (1891) been in operation for more than eight years. . . . Merchants and bankers say that it is a great convenience to them to have the whole of the general principles of the law of bills, notes, and cheques contained in a single Act of 100 sections. As regards particular cases which arise, it is seldom necessary to go beyond the Act itself. It must also be an advantage to foreigners who have English bill transactions to have an authoritative statement of the English law on the subject in an accessible form . . . the Act, as yet, has given rise to very little litigation. I am sure that further codifying measures can be got through Parliament, if those in charge of them will not attempt too much. . . . Let a codifying bill, in the first instance, simply reproduce the existing law, however defective. If the defects are patent and glaring, it will be easy to get them amended. If an amendment be opposed, it can be dropped without sacrificing the bill. The form of the law, at any rate, is improved, and its substance can always be

amended by subsequent legislation. If a Bill, when introduced, proposes to effect changes in the law, every clause is looked at askance, and it is sure to encounter opposition."

Now, here, incidentally, we get a glimpse for the first time of the importance of case law. The fundamental fact to remember is that the circumstances in each case differ; they may be very close in any two cases, but there must be some difference, and that difference may affect the law very much. It will not do to say common sense will show you whether the difference in the facts will make any difference in the law. It will not, just because you may not know whether there is any law affecting the difference or not; lawyers themselves are often puzzled to tell. For instance, one case may decide a point between a man and his "servant," and in the next the only difference may be that it is a case between a man and his clerk. The same words may or may not be actionable, according as they are written or spoken; whether a man is a partner or not may depend on very small things. A seller may or may not be able to recover the price from a buyer in exactly the same state of the facts, according as the price is below or above a certain amount. Therefore, when at any given moment it is proposed to collect all the law on a subject into a code, it is not possible to do so with absolute completeness, for all possible cases have not arisen; those actually adjudicated may absolutely conflict or seem to conflict, cases suggested by way of *illustration* in the course of a judgment may or may not be decided (i.e. the judge may or may not give his opinion how he should decide if the case he suggests came before him), or there may be doubt what principle of law the court laid down in a recorded case, though there be none about their decision on the facts before them. Hence Sir Courtenay Ilbert, another great authority on the matter,

says, "We know that the chief practical difficulty of the lawyer and the judge is not the apprehension of principles, but the application of principles to facts, and that the best constructed code cannot remove this difficulty" (*Encyclopædia of Laws: Codification*). And thus it is that, though he may not intend it, the draftsman cannot but make new law here and there, if only because he cannot insert his "probably" and his "perhaps" in the text of the bill. Where there is a doubt or a conflict in his authorities, he must perforce choose, and so later the question may arise whether the Act altered the existing law on a given point or not.

Nevertheless, a code may be of great practical value. Sir Frederick Pollock, who drafted the Partnership Code, says, "Codes are . . . for the ease of the lay people," and his Act "ought at any rate to make the substance and reasons of the law more comprehensible to men of business who are not lawyers . . . since difficult cases are, after all, the minority, perhaps it is of some importance for men of business to be enabled to see for themselves the principles applicable to easy ones" (Preface). This is an approach to Bentham's ideal: "The object of a code is that every one may consult the law of which he stands in need in the least possible time" (cited by Sir C. Ilbert). It is not to be supposed that an intelligent man could not understand an ordinary Act of Parliament, but he could hardly *guess* what other Acts—to say nothing of the cases—had a bearing on the one he was reading; but of this danger there is much less risk in a code, for it purports to have assimilated and digested all relevant matter.

It may be added here that since 1868 there has been a Statute Law Committee<sup>1</sup> which deals with the form of the

<sup>1</sup> See *Parliamentary Paper*, 1877 (288), Vol. 69, p. 373.

Statute Book. Its great achievement is the publication of the *Statutes Revised*, containing, so far, in twenty volumes all the statute law from 1235 to the end of 1900 still in force; Vol. 20 appeared in 1909. The minutest change in a statute is recorded yearly in the *Chronological Table of all the Statutes*, Vol. 1. This useful body has also swept away a great number of legal cobwebs lurking in the dark corners of obsolete statutes, using as brooms, "Statute Law Revision Acts," which, as it were, post the Statute Book up to date.

## 5. The Interpretation of the Law

There is a story that some Western State of America passed a law, in the interest of temperance, that no drinking-saloon should exist within a mile of any school-house. Under this a court decided that certain existing school-houses must be pulled down. The interpretation of the letter of the law may clearly be a matter of paramount importance.

In this country the official interpreters of the laws are the bench, and there never has been any doubt about it. A country J.P. sitting in a court must, if necessary, decide the meaning of words in an Act of Parliament. How judges came into existence at all we have tried to guess at above. The earliest type was, or was supposed to be—and it is likely enough—lawgiver and judge in one. Moses sat "alone" (Exod. xviii. 13), and it was too much for him; his court was popular, and he had to appoint subordinates, reserving his strength as a court of appeal for "the hard causes" (v. 26). In our own country it was "by slow degrees the work of hearing and deciding causes" was "disengaged from governmental business" (Pollock and

Maitland, *History of English Law*, I. vi.). Now the separation is complete.

Why, then, is the phrase "judge-made" law never used except in condemnation? Because those who use it think either that the judge or judges in question have interpreted the law wrongly, or have added something to a statute which Parliament did not intend to be there—that, in either case, they have "made" some law. It is obviously important to see whether, as a fact, there is any person or body but Parliament which does make new law.

A good instance is supplied by a case<sup>1</sup> in 1849. Mr. Thorogood was a passenger in an omnibus, and, wishing to alight, did not wait for the omnibus to draw up at the kerb but got out whilst it was in motion, and far enough from the path to allow another carriage to pass on the near side. An omnibus belonging to Mrs. Bryan coming up at the moment, Mr. Thorogood was unable to get out of the way, and was knocked down, and died in a few days. Mrs. Thorogood brought an action against Mrs. Bryan, but she was unsuccessful, and four judges held that Mr. Thorogood was so much "identified" with the driver of his omnibus, that the latter's negligence—his own seems to have been dropped—was his own negligence, as against a third party. They seem to have thought that Mrs. Thorogood had a remedy against the proprietor of her husband's omnibus. The point is that this decision (not on a statute, but at common law) became law, and it remained law till 1888, when the House of Lords expressly overruled this case, and exploded the doctrine of "identification." Meanwhile, no doubt, many cases had been decided as if the doctrine was right. It is worth quoting a few lines from a well-known text-book (not all, by the way, are written in this style).

<sup>1</sup> *Thorogood v. Bryan*, 8 C. B. 114.

"You are driving your dog-cart, we will say, at your usual furious and improper speed through the streets of a town, and I am going out to dinner in a hansom. My driver, as it turns out—though, of course, I did not know it when I employed him—is drunk, and, through the joint negligence of him and you, a collision occurs, and I am badly hurt. According to the formerly accepted view, I am so far identified with my drunken driver that *his contributory negligence is mine*, and I shall fail in my claim against you. This theory of *identification* was . . . finally destroyed" by a case<sup>1</sup> "where a collision having occurred between the steamships *Bushire* and *Bernina* through the fault of the masters of both, a passenger on board the *Bushire* was drowned. The representatives of the deceased brought an action *in personam* against the owners of the *Bernina* for negligence under Lord Campbell's Act"—as Mrs. Thorogood had done—"and it was held that the deceased was not identified in respect of the negligence with those navigating the *Bushire*, and so the action was maintainable" (Shirley's *Leading Cases*, 7th edit., p. 472). It is clear, therefore, that judges may make law, and that their law may be wrong, i.e. other lawyers of equal or greater authority do not agree with them.<sup>2</sup> On the other hand, the law they make is often right. Thus, according to Sir J. Fitzjames Stephen (*Digest of Criminal Law*, 1st edit., p. 345) that

<sup>1</sup> The *Bernina*, 13 App. Cases 1.

<sup>2</sup> "The subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation . . . it is declared not that such a sentence was *bad law*, but that it was *not law*." Blackstone, 1 *Comm.* 70. His commentator *ib.* refers to L. Mansfield's saying [in *Doe v. Pott*, 2 *Doug.* 722 in 1781], "The absurdity of Lord Lincoln's case [*v. Roll*, etc.: Shower, *Parly. Cases* 154, etc., in 1695] is shocking. However, it is now law": and to "the notorious [*R. v.*] *Bewdly* [Corporation] case, in 1712 (P. Williams 207) where the practice of a court for several years though directly contrary to the words of an act of Parliament was held obligatory."

perjury in a witness is punishable by the common law, is judge-made law, an "usurpation" of the Star Chamber in 1613. "The erection of the crime into an offence at common law is, no doubt, [one] of the boldest, and, it must be added, one of the most reasonable acts of judicial legislation on record." The point for the moment is that the judges' power of making law is derived from their right of interpreting the existing law—in this instance, the common law.

Let us take another case, where the question was whether there was a conflict between the common law and the statute law. In 1872 there was a great strike of gas-stokers in London, under the auspices of a trade union. Parliament, in 1871, had carefully regulated the rights of unions by one Act, and expressly provided for the ordinary offences of workmen on strike by another (Criminal Law Amendment Act, 1871). Before that time strikes were "hit" as illegal conspiracies, and it was intended and generally understood that in future a mere strike by a combination was not to be criminal. Nevertheless, Bunn and his comrades were tried at the Old Bailey, though they were not charged with any offence under that (second) Act. The judge held that, notwithstanding the statutes, they might be guilty of conspiracy at common law. They were convicted and sentenced to twelve months' hard labour (but only served four). It is not surprising, as Sir J. F. Stephen puts it, "this decision caused great dissatisfaction amongst those who were principally affected by it." As a result, the (second) Act was repealed in 1875, and replaced by one still existing (Conspiracy and Protection of Property) which puts the matter on a clear basis. Yet it does not expressly overrule the bad law. This, however, was done by five judges in 1891, who took the opportunity of saying (about this case, and another in 1867), "to hold that the very same

acts which are expressly legalised by statute, remain, nevertheless, crimes punishable by the common law is contrary to good sense and elementary principle." (*Gibson v. Lawson* 1891 2 Q.B. 560.) Sir J. F. Stephen mentions the offence of conspiracy as one which, in a sense, the judges created, and he may well say that the "history of the matter is by no means favourable to the declaration by the bench of new offences," and that this instance is probably the last occasion. Coke expressly held that a statute could not prevail against the principles of common law, but this has never been the accepted view.

The famous Statute of Frauds (1677) provides about certain agreements "noe action shall be brought . . . unlesse the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writeing and signed by the partie to be charged therewith or some other person thereunto by him lawfully authorised." In 1817 it was attempted in an action<sup>1</sup> to set up as an agreement the letters written by a mother to her son. One began, "My dear Robert," and ended, "Do me the justice to believe me the most affectionate of mothers"; but it was held that this was not a signature, though it might identify the writer. The son lost his case, and the law remains the same.

In 1902 Parliament resolved to protect music publishers against the piracies of their songs by street hawkers who sold them for a few pence (the printers, of course, not having any copyright in them). It was enacted that these copies might be seized by a constable without warranty; they were then to be taken before a court of summary jurisdiction, to be, "on proof that they are infringements of the copyright . . . forfeited or destroyed, or otherwise dealt with, as the

<sup>1</sup> *Selby v Selby*, 17 R. R. 1.



court may think fit." The judges, when appealed to, said that this did not mean that the order for forfeiture or destruction could be made without summoning the hawkers; he must be summoned before this could be done.<sup>1</sup> In 1915 the Court of Appeal thought that "the decision of *D. v. D.* [1913 P. 198] did alter the law, and therefore cannot be upheld." *N. v. N.* 1915 P. 191. Of course, no judge *consciously* rules because he thinks Parliament ought to have enacted according to his ruling; this would, as Lord Chancellor Halsbury once<sup>2</sup> put it, "look like a reflection on the Legislature," but when the point is doubtful, a judge is naturally biassed to what he thinks ought morally to be done.

All these instances have been given because it is important to remember that the power to interpret the law is practically power to make the law within certain limits. Parliament has itself supplied a key to some of its own meanings in the Interpretation Act of 1889. The golden rule, of course, is that we must look at the plain English of the statute—when it is plain. Thus, unless we may suppose a deliberate touch of humour, it is difficult (even though the statute is in Norman French) to appreciate Blackstone's remark (1 *Comm.* 60): "When a law of our Edward III. [1350-1] forbids all ecclesiastical persons to purchase

<sup>1</sup> For an instance of "an equity judge literally making the law," see *Law Journal*, May 7, 1904, p. 236 (on *Dearle v. Hall*, 3 *Russ.* 1, 55 in 1823-8). "It would be difficult to find a better instance of judge-made law than the rule laid down by the House of Lords itself that the House is bound by its own decisions" (Dicey, *Law and Opinion in England* (1905), p. 484; see all Note IV.).

<sup>2</sup> *Granville v. Firth*, 19 T. L. R. 213; 1903. On another occasion he said, "I think a Court of Law is bound to proceed upon the assumption that the legislature is an ideal person that does not make mistakes," 1891, A. C. 549. In 1701 Holt C. J. said "an act of parliament can do no wrong though it may do several things that look pretty odd." *City of London v. Wood* 12 *Mod.* 687-8, see n. p. 20.

*provisions*<sup>1</sup> at Rome, it might seem to prohibit the buying of grain and other victual; but when we consider that the statute was made to repress the usurpations of the papal see, and that the nominations to benefices by the pope were called *provisions*, we shall see that the restraint is intended to be laid upon such provisions only."

It is perhaps worth adding, that if any judicial decision is supposed to work injustice, Parliament can legislate so that the grievance is redressed; and it often does so, in fact. For instance, when, in 1858, it was decided that the fraudulent obliteration of the crossing on a cheque was not a forgery, an Act was passed in that year to make it a crime. The writing "not negotiable" on a cheque was authorised in an Act of 1876, introduced to prevent such a hard case<sup>2</sup> as occurred in 1875, when the payee of a cheque lost his money through its being stolen because, though he had crossed it to his bank, he had not thereby destroyed its negotiability. In 1875 a German steamer ran into an English ship off Dover, whereby several persons on the latter lost their lives. The German captain was tried at the Central Criminal Court for manslaughter and found guilty, but after much argument<sup>3</sup> the conviction was quashed on the ground that the court had no jurisdiction to try a foreigner for an offence on a foreign ship passing through British waters to a foreign port. In 1878 the Territorial Waters Act was passed to give such a jurisdiction. The Trade Disputes Act, 1906, was passed to get rid, so to say, of the "Taff Vale" Judgment (1901) as the Trade Union Act, 1913, was to counteract "the Osborne" decision in 1910. See p. 44 n. and p. 248 n.<sup>1</sup>

<sup>1</sup> And he might have added *collations*.

<sup>2</sup> *Smith v. Union Bank*, 1 Q. B. D. 31.

<sup>3</sup> *The Queen v. Keyn*, 2 Ex. D. 63.

## 6. Going to Law

So far we have been dealing with preliminary considerations concerning the system or framework of the law under which we live. We may now turn more particularly to its form, that is, the practice and procedure of the law (the effects of which often puzzle laymen, while the substance of the law is intelligible to them).

In a word, the sole object of practice and procedure (for here the two words mean the same thing) is to secure justice for the party aggrieved. The object of the substantive law is to enforce or apply great moral principles, the object of procedure (the adjective law, as it is sometimes called) is (or ought to be) to give litigants the benefit of that law with the smallest possible delay, and at the smallest possible expense.

Here we plunge at once into the vast theme of "going to law." In course of time, the law of "going to law" itself has become huge. Many books, not to say a whole literature, are devoted to the subject, and some lawyers have been famous as counsel or judges for their knowledge and experience of that law. By comparison with the cardinal principles which it applies and safeguards, procedure is justly depreciated as a web of formalities and technicalities, but its sole aim is justice in its very best form, and without it (in some shape or another) justice is nowadays impossible. Some people may conceive that if two persons have a dispute, ideal justice requires that they should be able to go off there and then (as the two mothers with the baby did to Solomon) to an officer of justice,<sup>1</sup> who will tell them

<sup>1</sup> This was literally possible and done in the case of a dispute between a cabdriver and his fare in London between 1853 and 1896.

whether either has a grievance which the law will recognise or redress, and, if either has, will decree a remedy or a punishment. But such a type of case is to-day almost impossible, if only because the parties do not usually desire so speedy a settlement. But even to this primitive unceremoniousness the law of to-day can approximate, especially in County Courts<sup>1</sup> and those of justices or stipendiaries, and even in favourable circumstances in the High Court.<sup>2</sup> In a police court, for instance, it is by no means inconceivable that a quarrel or a difference should be adjudicated upon within an hour or so of its occurrence, and if the magistrate's order (e.g. to pay a fine or restore a thing) can be satisfied on the spot, that there should be no formality (such as summons or notice) between the parties from beginning to end. Indeed, theoretically, the law has preserved—and the persistence is very noteworthy—both the immediacy of time in hearing and the personal pleading of the parties of the primitive type (e.g. the "Pie-powder"

<sup>1</sup> Unless it is otherwise stated, we refer throughout to the High Court. The history of the County Court is extremely interesting, but beyond our scope; its modern form dates from 1845.

<sup>2</sup> e.g. where there was a dispute on a bill of lading, and it was desired that the ship should sail on June 19, an action was begun on June 17, and, by consent, ordered to be tried, and was tried, on the 18, in the "Commercial" Court (*Anderson v. English and American Co.*, 1 Comm. Cas. 85, in 1895). See 1 *Cambridge Law Journal* 16, 1921. Before the same tribunal—founded largely to promote expedition in business disputes—an action was begun on November 22, 1895, ordered to be tried on November 29, and actually heard on December 3 and 5 (*Tyser v. Shipowners' Syndicate*, *ib.*, 224). In 1920 the judge of this court said that the average time between the beginning and end of a case was two months: 1 *Cambridge Law Journal* 17. For despatch in criminal law, see p. 270 n. A judge wished to see a state of things where, if the parties were willing, the cases might be tried within three or four weeks after the dispute (*Law Times*, October 15, 1904, p. 561). An appeal from K. B. D. (May 13) was decided in C.A. on June 23 (ten days' vacation intervening): *P. M. G.* June 24, 1908. The *Times* of Oct. 20, 1921, reports a case where there was a trial on Oct. 19 about a contract made on Sept. 12.

courts, where the dust of the journey was still on the parties' feet). The latter, in fact, is quite a common phenomenon; the former is rarer from a variety of causes, some of which are certainly remediable, and the tardiness of trial (which is much more pronounced in civil than in criminal cases, and in the High Court<sup>1</sup> than in the County Court) is a current topic of controversy. For our present purpose "immediacy" may be ignored; practically, all civil legal proceedings are begun by notice to the other side, where this is possible. The right of a party to appear and be heard in person is all but universal<sup>2</sup> in every court, from the highest to the lowest, and is frequently exercised. However, a very large number of litigants do not want to appear in person, just as a very large number do not want to try their cases to-morrow, so to say, if they could.

At any rate, to come back to a point above, primitive simplicity in our practice is unattainable. Much of that practice is simple, but much at any given moment can only be understood by one trained in its *technique*, that is, a lawyer. This accounts for the fact that a large part of the

<sup>1</sup> But since the first edition (1906) there has been considerable improvement.

<sup>2</sup> The exceptions are extremely rare. One is an application for a *mandamus*, i.e. an order to compel some one, generally a public official, to do some act in the administration of his office—of which Lord Coleridge once stated that it was the inflexible rule of the court only to hear counsel (*R. v. Eardley*, 49 J.P. 552, in 1885). The convenience of such a rule is overwhelming, but it does not appear on what the authority of the judges to refuse to hear any person alleging a grievance rests. It seems to be an anomaly and a genuine instance of "judge-made" law.

In 1794 a reporter (*The King v. Lord Abingdon*, 1 Esp. 226) thought it worth recording that "this trial exhibited the novel spectacle in Westminster Hall of a peer unassisted by a counsel or attorney appearing to plead his own cause."

In 1887 the Archbishop of York appeared in person before the Court of Queen's Bench, and successfully took exception to its jurisdiction (20 Q.B.D. 740).

criticism of the law, which is a constant feature of the newspaper, is aimed not at the principle of a statute, but at some incident of practice; the writer, probably, does not understand it. If he did, he would realise that the rule was originally designed solely in the interest of justice.

Historically, the relation between procedure and law proper (i.e. the ethics of conduct) has been intimate; here its nature can only be indicated—most conveniently in the language of Professor Holland: "Rules of procedure occupy so prominent a place in early society, and furnish so much curious illustration of the history of civilisation, that they have attracted a share of attention perhaps in excess of their real importance. One might almost suppose from the language of some writers that an elaborately organized procedure may precede a clear recognition of the rights which it is intended to protect. It has been said that law is concerned more with remedies than with rights. It would be as reasonable to say that a field consists in its hedge and ditch rather than in the space of land which these enclose. In point of fact, a right must be recognised at least as soon as, if not before, the moment when it is fenced round by remedies. The true interest of the topic of Procedure is derived, first, from the close connection which may be traced between its earliest forms and the anarchy which precede them<sup>1</sup>; and, secondly, from the manner in which the tribunals have contrived from time to time to effect changes in the substance of the law itself, under cover of merely modifying the methods by which it is enforced" (*Jurisprudence*, ch. xv., 1916, On "judge-made" law, see p. 33).

For every purpose, including procedure, we must

<sup>1</sup> Note *ib.*: "'Trial by battle' was a late survival in England of regulated self-help."

distinguish sharply between civil and criminal matters. Broadly, the distinction is popularly appreciated. Criminal law will be dealt with separately hereafter (p. 235). When people talk of going to law, they do not mean setting the *criminal* law in motion.

## 7. Morality and the Law

Before embarking on procedure for any end, it is essential to know whether the law can assist to that end. The law by no means takes cognisance of all grievances which an individual may suffer, immoral though the acts constituting the grievance may be. In what spirit, then, does the law recognise wrongs? The morality of the law is low, and there are many morally wrong and even wicked acts which it will not punish. A lie, for instance, may cause loss and damage to any one believing it to be true, but a lie, as such, is no offence against the law. It only becomes one in certain circumstances, e.g. in the mouth of a vendor whose misrepresentations induce a purchaser to enter into a bad bargain, and even then the technical penalty may only be rescission of the contract, though, no doubt, the costs of an action may be a substantial fine. Drunkenness in itself is not an offence. Unchastity is only visited by the law quite exceptionally. No action lies for libels on the dead. It is not a slander to say of a man that he is suspected of having committed a murder (unless there is "special" damage), and all sorts of foul abuse enjoy immunity if the words used do not directly cause damage. If the sparks from a railway engine set fire to anything, the owner cannot recover compensation from the company provided there is nothing amiss with the locomotive's conditions or

management. What a judge said in a case in 1891 is very much to the point. "A great part of the atrocious things which have been done by this man are not punishable by English law. It does seem an extraordinary thing that a man, being entrusted with money by other people for investment, should be able to put it into his own pocket fraudulently and dishonestly, and yet commit no crime punishable by English law. I am reminded of a circumstance that was mentioned to me some time ago by a friend very greatly versed in the English criminal law. In the course of his studies he made out a list of the iniquitous things which could be done by the English law without bringing the man under any provision of the common or statute law, and he had had it in his mind at one time to publish it, to show how defective the law was, but he forbore on grounds of public policy to call attention to what people might do without rendering themselves liable to punishment."<sup>1</sup> Now, in all these instances—except that of the railway—the wrong done is, no one can deny, a moral wrong. On what principle, then, does the law refuse to take notice of them?

The answer, broadly, is that it cannot take notice of all moral failings, and, therefore, it must pick and choose. It cannot, because it would be physically impossible. To be the guardian of all morality it would have to contemplate every fault of temper, every act of discourtesy, every deviation from the truth, including every mis-statement of fact, every act of disobedience, every broken word, every infirmity of disposition, every spiteful or unkind action—in short, everything that could be described as immoral in the sense of flowing from a bad motive or a bad habit.

<sup>1</sup>*In re Bellecountre*, 1891, 2 Q.B. 141. Cf. p. 23 n. But the Larceny Act of 1901 removed the difficulty in this particular case: *post* and *propter hoc*.



Even if there was a limit of age beneath which there was no subjection to the law, there would be a large period in which the faults now within the jurisdiction of the father or the schoolmaster would be investigated by a public tribunal. Life under such a system would be intolerable. This is so obvious that there can be no need to follow it out; but it is, perhaps, worth adding that one certain effect of such a state of things would be that men would avoid the society of other men. Our law is practical, and selects only what it considers most important to put under its ban, leaving other wrongdoings to the social sanction, i.e. to the discretion of the individuals in contact with wrongdoers, whether and how they will punish them (Cf. p. 46). It may well be questioned, in any given case, whether this policy is right. For instance, it is maintained that to be drunk should be a legal offence. But in this, as in every other instance, it will be found—though the reason may not satisfy every reformer—that there are some grounds for legislative inactivity. In this case it may fairly be held that to attempt to prosecute every one, say, who took “too much” to drink in a private house, would encourage such an amount of spying and domestic treachery, and would lead to such endless diversity of opinions whether the extreme limit of sobriety had been reached or not, that such a moral law, pure and simple, could not be administered fairly and equally, and would probably fall into contempt. In other words, such a prosecution would do more moral harm than moral good. This, too, is a principle of the law that we shall hear more about, viz. that where the administration of a law is very difficult,<sup>1</sup> or likely to be inequitable—

<sup>1</sup> “For the law has no power to command obedience except that of habit” [=public opinion], one of the greatest dicta in one of the greatest books: Ar. *Politics* B. 2. c. 8 s. 24. (Cf. p. 8 and p. 305 n.).

which happens especially when it is hard to "draw the line" between those who are to be included and those who are not—that is a reason against instituting the law. So with much immorality—in the narrow sense. Rightly or wrongly, it is believed that a legal sanction is not the surest way—not so sure as the social sanction—to prevent it; and, in any case, that a legal punishment is too great an invasion of individual freedom of action, though that freedom be shamefully abused. (Some countries are severer in this respect than ours.) In this instance, in the conflict with individual liberty, the law gives way.

The moral law, then, and the legal law are not co-extensive. The law picks what it chooses out of the moral law. Consequently it never purports to enjoin anything but what is moral.<sup>1</sup>

## 8. Non-Moral, but Illegal

It is convenient to point out here the principle on which the law enforces a multitude of things which have no direct or obvious connection with morals. If the maximum legal rate at which a motor may be driven is twelve miles an hour, it could hardly be called an immoral act to drive at thirteen. But it is immoral to disobey a law, not repugnant to the conscience, and, the rate being once fixed by authority the law as properly regards a transgression of it as a violation of the moral law as a breach of faith or a burglary. Rules, regulations, by-laws, details, etc., in fact often supply illustrations of the recognition of the duty of obedience to the law because it is the law. (See p. 236.)

<sup>1</sup> The frequent dictum that "Christianity is part" of our law must now be interpreted, that the law will enjoin nothing against Christian *morality*; it cannot refer to Christian dogma as Lord Coleridge pointed out in *R. v. Ramsay and Foote* 15 Cox C. C. 235, in 1883.

## 9. Litigation

Once at law, technicalities begin. Foremost among these, in time and importance, is giving clear notice to the other side what the alleged grievance against him (or her, or them) is. It is by no means intended here to describe the stages or incidents of an action; the title of this volume is kept steadily in view, and general principles adopted by the law only are dealt with. The one applicable most closely to the beginning of all legal proceedings is that each party should have ample opportunity to state its case, which implies that the party attacked shall have ample opportunity to defend itself. One great step toward this end is that the issue between them should be clearly defined, and as soon as notice is formally given that the law has been set in motion, authority steps in to decide the next moves on both sides. Its object is that, when the actual day of judgment, the trial, comes, the judge and each side may know exactly what it has to prove or what to meet, respectively. It is obvious that if the matter at issue is simple, the first notice may tell the defendant all he can expect to know, and for this case, too, provision is made. But, generally speaking, at this point the question of "pleadings" arises.

If this were a history, a volume of it might be devoted to the extraordinary part that "pleading" for centuries—indeed, till quite recent times—played in our procedure. A few instances will bring this home. The first two are taken from criminal trials, at which a man's life was in peril, but the principle was the same throughout the law. Crone, in 1690, was found guilty of high treason. "A motion in arrest of judgment was instantly made on the

ground that a Latin word, endorsed on the back of the indictment, was incorrectly spelt. The objection was, undoubtedly, frivolous. . . . But Holt and his brethren remembered that they were now, for the first time since the Revolution, trying a culprit on a charge of high treason. . . . The passing of the sentence was therefore deferred, a day was appointed for considering the point raised by Crone, and counsel were assigned to argue on his behalf. 'This would not have been done, Mr. Crone,' said the Lord Chief Justice significantly, 'in either of the last two reigns.' After a full hearing, the bench unanimously pronounced the error to be immaterial, and the prisoner was condemned to death" (Macaulay, *History*, ch. xv.)<sup>1</sup>.

"Chelmsford. John Taylor had been arraigned and tried on the charge of uttering a forged note in the name of Bartholomew Browne, for £820 10s. od., with intent to defraud the bank of Cricket and Co., at Colchester, of which the jury found him guilty; but just as Baron Hotham was about to put on his black cap, and to pass the sentence of death on the prisoner, one of the barristers, not retained on the trial, happening to turn over the forged note, saw it signed Bartw. Browne; throwing his eyes immediately on the indictment, perceived it written therein Bartholomew Browne. He immediately pointed out the circumstance to Mr. Garrow, counsellor for the prisoner, who rose up and stated the variance as fatal to the indictment, in which the judge concurred, and discharged the prisoner" (Annual Register, 1800, March 30).

In both these instances an infinitesimal technicality made for leniency (though none the less one defeated justice as it was understood at the time). It was in civil matters

<sup>1</sup> For a similar ludicrous wrangle (just before sentence of death) see 12 *State Trials* 815-6: 1691, and see p. 50 n.

that pleading flourished most rankly,<sup>1</sup> and was most intimately associated with injustice. What the state of things was a century ago, let a most competent witness, John Campbell, afterwards Lord Chancellor of Ireland and, then, of England, when a law student and pupil of Tidd, the great special pleader, attest. In his Autobiography is the following letter written by him:—

“May 17, 1804.

“There is the most scrupulous nicety required in these proceedings. For instance, there are different kinds of actions, as *assumpsit*, *detinue*, *trespass*, *case*, etc. The difficulty is to know which of these to bring, for it seldom happens that more than one of them will lie. There is still more difficulty in the defence to know what is a good justification, and how it ought to be pleaded, to be sure that you always suit the nature of the defence to the nature of the action, and to take advantage of any defect on the opposite side . . . by continuing in this low, illiberal drudgery so long their (special pleaders’) minds are contracted, and they are mere quibblers all their lives after.”

This state of things lasted a good while longer—in less exuberant shapes down to our time. The overwhelming importance which pleadings for centuries<sup>2</sup> had in the

<sup>1</sup> See, for instance, pp. 46–9 of the first edition (1906) of this book; at this distance of time it is not worth while reproducing them. The curious should look at *Criticisms on the Bar* by “*Amicus Curiae*” [J. P. Collier], 1819, pp. 5–6. In *Roe v. Gudgeon*, *G. Cooper*, 304, 1815, “defendant swore that his reason for not setting out the account was that it was so voluminous that the stamps to the schedule would alone cost £29,000.” The suit had been going on “on the accounts” in the Master’s office for nearly 25 years: Bennet, *Note-book of a Law Reporter*, p. 113, 1867.

<sup>2</sup> There is a story that Coke once said to the counsel in his court, “I have seen the time when, if you had pleaded an erroneous plea, you would have been sent to prison.” “The whole system of pleading and the old state of things . . . was at once absurd and iniquitous” Lord (Chief Justice) Coleridge in 1876; 2 *Life*, p. 259.

The absurdities to which this system led are amusingly illustrated by the following stories. “Some pleading was delivered, and one of the statements in it was that on March 29 plaintiff called on

practice of the law, is now of historical interest only. The science was a study by itself, and had a band of professors solely devoted to it; indeed, the names of some of these "special pleaders" have lingered on into the law lists of recent years.<sup>1</sup> But most of the forms and almost all the spirit of this institution are gone, and to-day we claim to take a common-sense practical view of everything, and the tendency is altogether away from technicality. "It may be asserted," says Lord Bowen, "without fear of contradiction, that it is not possible in the year 1887 for an honest litigant in Her Majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation. The expenses of the law are still too heavy,<sup>2</sup> and have not diminished *pari passu* with other

defendant with tears in her eyes." The clerk put this into the form of an interrogatory: "Is it not a fact that on March 29 plaintiff called on defendant, and whether or not with tears in her eyes or in one, and which of them?" (*Law Journal*, December 9, 1905).

It is said that an indictment for murder was held bad (i.e. the case could not go on) because it alleged that prisoner cleft deceased's head so that half of it fell on each shoulder, but did not state that he died from the blow.

<sup>1</sup> There was one in the list for 1910.

<sup>2</sup> This idea persists in our literature. In Massinger's *New way to pay old debts* (1626) Sir Giles Overreach has a scheme for ruining an enemy by law costs. "When I have harried him thus two or three years, though he sue *in forma pauperis* in spite of all his thrift and care he'll grow behindhand." "You'll go to law, will ye?" says Alderman Smuggler in Farquhar's *Constant Couple* (II. 4), 1700. "I can maintain a suit of law be it right or wrong these 40 years, thanks to the honest practice of the courts." Burnet, History 658, (about 1730) says: "The law of England is the greatest grievance of the nation, very expensive and dilatory, there is no end of suits, especially when they are brought into chancery. It is a matter of deep study to be exact in the law. Great advantages are taken upon inconsiderable errors." "The true wonder was how a cause ever ended at all. One law suit in those days almost entitled a counsel to marry" (L. Cockburn, *Journal*, November 8, 1848, of Scotland). A City magnate once said of the hierarchy of our courts: "Yes, and there is another behind the House of Lords—the Bankruptcy Court." (See also Scrutton L. J., in 1920; 1 *Cambridge Law Journal* 9-10.)

abuses. But law has ceased to be a scientific game that may be won or lost by playing some particular move" (Ward's *Reign of Queen Victoria*, i. 310).

If any one date can be assigned for the change, perhaps it is that of the great Judicature Act of 1873. "The system of pleading," says a master of the art, "introduced by the Judicature Acts is in theory the best and wisest, and, indeed, the only sensible system of pleading in civil actions. Each party in turn is required to state the material facts on which he relies; he must also deal specifically with the facts alleged by his opponent, admitting or denying each of them in detail; and thus the matters really in dispute are speedily ascertained and defined. Some such preliminary process is essential before the trial" (Blake Odgers on Procedure, Pleading, etc., Preface).

## 10. Preliminary Processes

The simplest of such preliminary processes is what we have already called the formal notice of the action. To this, of course, there may be no response; in that case it is only fair that the sued shall be taken to admit the claim—judgment goes by default, as it is called.<sup>1</sup> Where the claim is for a specific sum or thing, judgment can be at once given; but if the demand is for damages, i.e. for a sum to be found or assessed by a jury or a judge, there must be a further proceeding on this point only, as will appear when we touch on Damages (p. 124). So at any stage of the pleadings the

<sup>1</sup> In 1911 in the King's Bench Division "there were in round numbers 11,000 actions in which judgment *in default of appearance* was entered . . . a considerable proportion of King's Bench actions begin and end with the issue of the writ—probably from 15,000 to 20,000 in a year. These are mere debt actions in which the defendant pays the debt and costs directly he is served with the writ." Sir John Macdonell, *Civil Judicial Statistics* for 1911, p. 14.

sued or the suer may make default in the next formal step. But for the moment we deal with the normal course of litigation; but even here we must distinguish between litigation of two characters. It will be easily understood that most disputes at law are *bona fide* disputes, but there may be disputes which are not *bona fide*. For instance, I may lend a man money, and have to sue him for repayment. He has no answer, he cannot deny that he owes the money. It would be absurd to bandy pleadings to and fro, and to go through the trouble of a trial. There is a simple process by which the debtor is prevented from defending such a action, and judgment is at once summarily given for the suer. It is clear that in such a case any resistance to the demand can only be for the purpose of delay, for the debtor to gain time, and justice requires that such a purpose should be defeated, and all the more so because a dishonest or disingenuous litigant, when sued, can always get some delay by making a formal answer, called "entering an appearance," to the formal notice that the action has been begun, though he cannot do this without some cost. Still, it is obvious that the power of giving summary judgment may be easily abused: people are not to be lightly shut out from making their defences. Consequently, great caution is exercised in granting this privilege to suitors; the mere suspicion that delay only is sought, or that the defence is not honest, is not enough. It must be manifest on the face of it, that in law there is no answer. For instance, A. has given B. a cheque in payment, say, of a debt, and then stops the cheque, or it is dishonoured. B. sues A. A. swears the debt was for a bet. If this is true, he is not liable to pay. This may be utterly untrue, and B. may swear that he actually lent A. the cash, and the official, a Master, who has to decide may believe him. But he cannot



give judgment summarily in his favour; there is an issue between the parties, and it must be tried. Or suppose B. has supplied A. with goods, and has not been paid for them. When he sues, A. says, "True, I bought the goods of you, but they are not up to sample, or not in proper condition; or, I ordered one thing, you sent another; or, you are asking more than the agreed price." The same official can see at a glance what amount A. disputes and what he admits to be due to B.—e.g. the value he puts upon the goods he has in fact kept, or the price *he* asserts was agreed—and he may order this sum to be paid into court as a condition of going to trial. "If you don't," he says in effect, "I give judgment against you." This, at any rate, deprives A. of the advantage of delay. (The official may, in his discretion, order the admitted sum to be paid to B. as a condition of allowing a trial about the rest; but, generally, when there are outstanding questions between the parties, it is fairer to have the money brought into court.) Or he may say, "How can I decide whether the goods were in proper condition, or up to sample, etc.? A. denies all liability, as he is entitled to do if he is right. You must fight it out in court"; and so, in this and in other cases, he gives unconditional leave to defend. The obligation to pay into court is found, in practice, to lead to a speedy satisfaction of *just* debts, for the dilatory debtor has nothing more to gain, and may lose much in costs by going on. If the party ordered to bring a sum into court as a condition of defending an action feels himself aggrieved, he may appeal against the order; and in a well-known case<sup>1</sup> in 1901, though such an appeal, first from the Master to a judge, then from him to the Court of Appeal, was unsuccessful, it was finally allowed by the House of Lords.

<sup>1</sup> *Jacobs v. Booth's Distillery Company*, 85 L. T. 262

Such preliminary processes as we have mentioned are not pleadings, and are not connected with pleadings, but have been touched on as sharing with pleadings the character of preliminaries to trial. The great bulk of cases are *bona fide* disputes, i.e. on the face of them there is a genuine difference between the parties on questions of fact or law (whether the motive of each in going to law is honest or not), and it is in such cases that there are pleadings almost without exception. There is, however, an exception even here. "In November, 1893, for the first time in the history of our law, power was given to a plaintiff to dispense with pleadings, if he thought fit." It is only practical where the issue is extremely simple and sufficiently appears in the first formal notice to the other side, and is barely possible without the consent of the other side. But as, "on the whole, the experiment has proved a failure" (Blake Odgers on Pleading)<sup>1</sup>, it may be dismissed here with the reminder that in County Courts the pleadings, if they may be so called at all, are of the simplest—a state of things which some reformers would introduce "above."

In a very large proportion of cases, then, the proper authority, among other directions which he gives on the conduct of the action launched, orders pleadings to be delivered. The only technical quotation here shall be from the writer already mentioned. "The fundamental rule of our present system of pleading is this—

Every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the

<sup>1</sup> Cf. Sir John Simon, K.C. (Address to the American Bar Association at Cincinnati, Aug. 31, 1921), "The old system of pleading has been abolished with the result that more simplicity has been introduced into the preliminaries of trial, though *with a sacrifice of precision* which many of the best English lawyers realise to be a misfortune."

party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved."

It is not worth while to give a specimen of a set of pleadings. They vary, of course, with the circumstances of each case, and the possibilities, therefore, are infinite, and one example is not a precedent for another. The contents may, perhaps, be brought home to a layman thus. Imagine two persons having a difference and endeavouring to settle it by correspondence, *without argument*. A. states his grievance in a letter to B., confining himself absolutely to what he believes to be the facts relevant, and demanding specific satisfaction. B. replies, giving his version of the facts, either denying, or admitting expressly or impliedly, the facts alleged in A.'s letter, but always taking care not to "show his hand," any more than A. did, i.e. saying nothing about the evidence he can bring, who is to prove this or that of his facts, etc. A. will probably write back and gladly acknowledge the admissions of B., if any, and point out that now the only questions between them are so and so; or, on B.'s answer he may formally withdraw some of his statements, and adhere to the rest; or, if there are no admissions on either side, A. may coldly reply that it is now plain what the dispute or disputes is or are between them, and here very frequently, in law and out of it, the correspondence may cease. But it may go on a little further if A. introduces new matter—always of alleged fact—in his reply, whether as a result of what B. has said or not, and B. may think it worth while to rejoin. At any rate, when the exchange of letters ceases, it is obvious, if the writers have not satisfied each other, the dispute must be settled otherwise than by the pen, and probably the last word in the epistolary war will say so. Now, suppose the chosen arbitrament is the

law; then a correspondence of this sort, put into the hands of the judge at the first moment of the trial, will be the pleadings, and ought to enable him to see at a glance what "it's all about." In other words, he knows the four corners within which the contention must be carried on, and beyond which it is his duty not to let it range without good reason.

The pleaders, of course, in the interchange sketched, always have their eyes on the positive law pertinent to their facts, i.e. they know that sooner or later the correspondence will be submitted to other lawyers, and the suer, therefore, has to fix on the form of his action—a purely technical matter, and generally but not always very simple, for he only has to decide whether he will frame it as for libel or trespass or debt, or breach of contract or detention, etc., or for several of these together—grievances which cannot be confused—though in a state of complicated facts it may be a very difficult matter to know on what ground to sue. And as he must sue on some definite legal ground,<sup>1</sup> he must

<sup>1</sup> Or several legal grounds arising out of the same facts. For instance, suppose a shopkeeper who deals in furniture dismisses his manager, who takes away with him a favourite desk he has been in the habit of using during his service, and to which he lays claim, and of which he obtains possession by reason of his facilities for going all over his master's premises. The shopkeeper could sue him for detainee, or trover, or conversion—there is now no practical difference between these—i.e. for return of the desk and for damages for its detention, or for the value of the thing. Or, he could elect to treat the ex-manager's act as a purchase of the desk, and sue for the price. And at the same time he could sue for damage for the trespass to the shop and warehouse if, after his authority as manager had ceased, he presumed to enter. Further, suppose that in taking the chattel away it had been injured, or that the taker had sold it for cash after he got it. The true owner might, in addition to its return, ask for damages for the negligent treatment of his property in the former case, and in the latter sue for money had and received to his use. The pleader, not knowing exactly what evidence he would be able to produce at the trial, would be justified in framing his claim on all these grounds simultaneously (even "in the alternative," where

be aware—as his opponent must be alert—that that opponent does not find reason to say that, admitting every fact alleged by the suer, his action must still fail, for all these facts combined do not in law give a cause of action, i.e. they disclose nothing of which the law will take cognisance. If this be so, it is obviously just that the action should not be allowed to go farther, causing unnecessary waste of time and money, and so there is a procedure by which, if such an objection is taken, it may be decided whether, on their pleadings, the parties had anything to go to law about. In this extreme form this power is not commonly exercised. One case may be mentioned,<sup>1</sup> where, undoubtedly through the “rigging” of the market for certain shares, a man had

they were inconsistent), as his client would be, content, of course, to win upon one. The judge (and jury, if there is one) will see that substantial justice is done. Thus, if the shopkeeper makes out his title to the desk, they will either award him the fair price of it, or, if he prefers to have it back, they will see that he is compensated for any deterioration to its selling value by giving him adequate damages, whether they call them damages for negligence, or trespass, or conversion. If the facts proved ground one form of action alleged and not another, the judge may, and often does, there and then allow the pleading to be amended—provided, of course, that no injustice is done to the other side by taking them by surprise—so that a mere technicality shall not defeat the object of the trial. The large powers of amendment judges now possess is an essential feature of the present system of pleading. Nevertheless, it is by no means a matter of course that leave to amend is given. For instance, where a certain agreement was set up, it was alleged in answer that it was not valid because one party, whose agent had signed it for him, was of unsound mind, and therefore the agent was not lawfully authorised to sign. But the judge found that the principal was not of unsound mind, and refused to allow the agent's want of proper authority to be set up as a separate and independent defence, because, on the pleadings, the other side could not be prepared to meet such a case. All they could be expected to do was to show that there was nothing wrong with the agreement on the ground of the principal's insanity; nothing else affecting the agent's appointment had been alleged against them. Consequently the impeacher of the agreement lost his case, though if his pleader had set up the agent's defect substantively, he might have won. *Byrd v. Numm*, 1877, 7 Ch. D. 284.

<sup>1</sup> *Salaman v. Warner*, 64 L. T. 598, in 1891.

lost nearly eight thousand pounds. His action was stopped before trial because it was held in law, if all his allegations were proved, they would not give him the ground of action he had set up. In other words, for the moral fraud of which he alleged he had been the victim, the law gave no relief. But the power of striking allegations, generally, out of all pleadings on the ground that they have nothing to do with the questions at issue, and therefore ought to be eliminated before these issues are determined, is hourly exercised. The attempt to introduce irrelevant considerations with a view to prejudice opponents is the echo of a private quarrel, and cannot be permitted in a scientific inquiry.

A comparison has already been made between an interchange of pleadings and the course of a correspondence on some disputed matter. Certain questions would probably be asked by one side or the other, with a view of clearing up doubts about the meaning of the other side's statements on certain points, or, possibly, on the main point in issue. So it is at law. A man cannot sue me for a sum of money without giving particulars. He must, at least, say whether he lent me cash, or sold me goods, or paid a debt or subscription for me at my request. In a good many cases this will be enough; I shall know to what he refers. But he may send in a bill for a period of twelve months, merely demanding a certain total sum. I am clearly entitled to know the amount of each item, when and for what it was incurred, and if he sues me for the lump sum, there is a short way of making him state these specific facts at his expense, even though it ultimately turns out that he was right on every one, and I owe him every penny he claims. And so, generally in every case, one side or the other may ask for particulars of some statement the opponent has made, and if the proper tribunal decides that there cannot

be a full or fair trial of the dispute without them, it will order them to be given, and if this order is disobeyed, the defaulter will not be allowed to get any advantage from—possibly not to prove—his incomplete statements, and may be adjudged to lose the cause for his default. Take another instance. “In an action for conspiring to induce certain persons by threats to break their contracts with the plaintiffs the defendant is entitled to particulars stating the name, of each person, the kind of threat used in each case, and when, and by which defendant, each such threat was made, and whether verbally [orally?], or in writing, if in writing, identifying the document” (Odgers).

These are simple cases, and it may seem strange that any one should want to withhold these details; but, as a matter of fact, it would often help one side materially at the trial if the other side did not know what they were going to put forward, for it would then be too late to refute it, and it must needs go unchallenged, and hence, in practice, there are often severe contests what particulars, if any, should be given, and it is often very difficult for the tribunal to say what is fair between the parties. For example, to take Dr. Odgers’s next instance, “where directors pleaded under the Directors’ Liability Act, 1890, that they *bona fide* believed their statements to be true, and that they had reasonable grounds for their belief, they were ordered to deliver particulars of the grounds of their belief,” it is easy to see how conveniently, if they had done anything wrong, they could shelter themselves under an honest belief which was impervious to scrutiny, and how readily, upon a compulsory disclosure, their whole case might collapse. Nevertheless, assuming that they had acted with absolute probity, it is quite conceivable that it might be fatal to the interest of their company to divulge what was asked, for

they may have had private and confidential information, which, of course, would not be again forthcoming if the name of the informant had to be revealed. This illustrates the difficulty the tribunal often feels in adjudicating on particulars. Still, the tendency now is to grant rather than to deny them. "Now we play with the cards on the table" (Odgers).

Yet other precautions may be taken to secure a thorough threshing out. It may be possible or likely that if a party sees a document, whether he has forgotten or never knew of its existence, or being well aware of its existence, does not remember its contents, that the litigation may come to an end: he may be satisfied. Or, it may be only fair in the circumstances, that both parties should inspect the document itself or have a copy of its contents. There is a procedure by which these rights may be secured. Dr. Odgers puts a common case. "Some material letters have, as a rule, passed between the parties before the dispute arose which may contain the contract sued on, or be evidence of its breach or of an independent tort; but the plaintiff has the defendant's letters, and the defendant has the plaintiff's, and neither set is properly intelligible without the other. Moreover, it is most desirable that any one who intends to give evidence should, if possible, see his own letters written at the time before he enters the witness box. For his recollection of an interview which took place many months ago is probably somewhat hazy now, and far less reliable than his letter, which remains in black and white as clear and intelligible now as it ever was." And a party may be ordered to swear what material documents he has. Here, too, care is taken that neither party is called upon to yield anything which is not relevant to the case, and which can fairly be considered to violate the privacy of the other.



While there are all sorts of safeguards to prevent this kind of intrusion, any attempt to keep back a document in order merely to embarrass an opponent would certainly be punished at the trial, whether it was then produced or not. Many, of course, are not wanted till then, and a mere notice to produce them then is sufficient; for instance, original letters or papers of which you have copies, or which you do not care to inspect till the last moment, but *may* want then.

The resources for saving time, trouble, and expense at the trial are not even yet exhausted. "Besides discovery of documents," say the writer quoted already, "the parties may also require discovery of facts. Indeed, they will especially require this in those cases where there are no material documents to be disclosed. For it is in those very cases that there is almost sure to be a conflict of evidence, and that makes it all the more desirable for the parties to ascertain before the hearing what are the exact points on which there will be this conflict. Take, for instance, an action for personal injuries caused by a collision on a railway. There are often no documents existing which throw any light on such a matter. Yet it is most important for the plaintiff to know, before he comes into court, whether at the trial the defendants will seriously contend that no such collision ever took place, or that the plaintiff was not a passenger in either train on the day of the collision, or that he was not injured thereby. The court, in a proper case, allows one party to administer a string of questions to the other, and compels that other to answer them," on oath, "subject to certain restrictions." This procedure would obviously be liable to great abuse, were not a check provided by the authority of a judicial official, who may refuse to allow certain questions to be put. The following instances of interrogatories are given by Dr. Odgers:—

"Were you not examined as a witness in the Bankruptcy Court on the 15th of May, 1896, or some other and what day? Was not a cheque then and there produced to you? Was not the said cheque the one mentioned in paragraph 4 of the statement of claim,<sup>1</sup> or some other and what cheque? Did you not state that such cheque was in the handwriting of the defendant? Did you not state so on oath? Did you not state that such cheque was in the handwriting of one John Henderson? If nay, in whose handwriting did you state the said cheque to be?"

"The publisher of a newspaper must answer the interrogatory (in a libel action), "Was not the passage set out intended to apply to the plaintiff?" But he need not answer the further question, "If not, say to whom?" as if the passage did not apply to the plaintiff, it is immaterial to whom it referred, so far as the present action is concerned.

"If the proprietor of a newspaper accepts liability for a libel published in his paper, he cannot, as a rule, be interrogated on the name of the writer of the libel, or on the sources of his information."

"Interrogatories asking plaintiff whether similar charges had not been made against him previously in a newspaper, and whether he had contradicted them or taken any notice of them on that occasion, are clearly irrelevant," and cannot be put.

"Are not the prices charged by the plaintiffs for . . . goods fair and reasonable? Which of the said prices do you allege to be exorbitant? Specify in each case what sum you would deem a proper and reasonable price?"

In all these preliminary processes there is a simple and summary means of resisting any of the orders sought, and appeals from decisions on these points are common.

<sup>1</sup> See p. 56.

## 11. Jury or No Jury ?

There is yet one very important preliminary matter to be dealt with before trial, viz. the kind of tribunal<sup>1</sup> which is to dispose of the issues. Is it to be judge and jury, or judge alone<sup>2</sup>? and, if the former, is the jury to be common or special? We say nothing here about criminal trials of indictments (see p. 285) (except that in all, without exception, there must be a jury<sup>3</sup>; proceedings in police courts or petty sessions (p. 252) are not *trials*), and in County Courts either party can insist on having a jury (of eight, since 1903), except in trifling cases (and can have one even then by leave of the judge). For the moment we confine ourselves to the King's Bench Division of the High Court.<sup>4</sup> There the official who, as we have seen, decides so many preliminary points of practice decides (subject to appeal)

<sup>1</sup> Certain actions begun in the High Court may (and sometimes must) be sent for trial to the County Court if the official thinks there is a balance of convenience in cheapness or expedition in doing so: p. 117 n.<sup>1</sup>

<sup>2</sup> The Juries Act, 1918, *temporarily* suspended the right to a jury in some civil causes, and the Administration of Justice Act, 1920, continues this *power* of suspension.

<sup>3</sup> When the House of Lords tries, the House itself is the jury. See p. 268 n.<sup>2</sup>.

<sup>4</sup> Actions in the Chancery Division will be mentioned elsewhere (p. 229). Probate and divorce tribunals are constituted on exactly the same *principles* as those in the King's Bench, but the question of a jury is not determined by the authority of the same official. In Admiralty there practically never is a jury, though there may be; the judge, when nautical knowledge is required, is assisted by two Trinity Masters. In some old courts scattered through the kingdom (e.g. the Lord Mayor's Court in the City of London), the judge never tries an action without a jury. In cases of very great importance (civil or criminal) in the King's Bench, three judges sit with a jury; but this is very rare, e.g. the Tichborne case in 1873; the action of the Attorney-General against Mr. Bradlaugh, M.P., in 1884; Dr. Jameson's case in 1896; Lynch's (treason) in 1902, and Casement's (treason) 1916.

whether there shall be a jury or not. This he does broadly on the ground that the issue to be tried is, or is not, one of law or one of fact (p. 66).

In many actions, notably slander, libel, false imprisonment, malicious prosecutions, seduction, breach of promise of marriage—where reputation is peculiarly at stake—either party can claim a jury as of right.

It is not clear *now* why a jury should especially be the arbiter of facts; *historically*, no doubt, the original juries were the witnesses themselves.<sup>1</sup> But to-day, single judges frequently, invariably in the Chancery Division—or two, as in election petitions, or three, as in the Parnell Commission<sup>2</sup>—come to conclusions of fact. Where life or liberty is

<sup>1</sup> A striking example of the prevailing *theory* is in Miss Durham's *High Albania* (1909), p. 28: "A man accuses another say, of theft. He lays the case before the Bariaktar [the hereditary standard bearer of the tribe]. The point to be determined is whether a sufficient number of con-jurors can be found before whom the accused may swear his innocence and who are willing to swear to it with him. The Bariaktar can decide how many to summon. The plaintiff has the right to nominate them. They must belong to the tribe. The accused may object to a certain number—it depends, I believe, on how many are called—and have them replaced. All meet before the council. The accused and plaintiff are heard. Should the con-jurors agree that the accused is innocent the Elders acquit him. (It must be remembered that in these tribes everyone knows all about everyone else's doings.) Should all con-jurors but one agree to his innocence that one can be dismissed but two must replace him. The plaintiff, if not satisfied, has the right to demand more con-jurors up to a fixed number according to the crime. Twenty-four may be demanded for murder, and from two to ten according to the value of the thing stolen. Eight for a horse. If it cannot be otherwise decided the defendant may put in witnesses from among his own family. . . . For theft twice the value of the thing stolen must be given to its owner and half the value to be divided among the Elders." (See p. 13.) In that jurisprudence a man may be "so important that he counts as twelve witnesses in a trial."

<sup>2</sup> This, consisting of three judges, was quite a special tribunal, created by statute in 1888, and had only power to inquire and report, not to convict and sentence. There was, of course, no jury.

at stake, as usually in criminal trials, naturally no judge would willingly take upon himself the responsibility of a decision, and, though in a less degree, the judges have, no doubt, been glad to escape from this burden in civil matters; hence, perhaps, the persistence of juries. Moreover, Lord Chancellor Halsbury is reported to have said, "As a rule, juries are, in my opinion, more generally right than judges" (*Law Journal*, September 26, 1903, p. 469). Their great panegyrist is Blackstone in the following classical passage: "Trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law And if it has so great an advantage over others in regulating civil property, how much must that advantage be heightened when it is applied to criminal cases!" . . . Montesquieu, "who concludes that because Rome, Sparta, and Carthage have lost their liberties, therefore those of England in time must perish, should have recollected that Rome, Sparta, and Carthage, at the time when their liberties were lost, were strangers to the trial by jury" (*Commentaries*, vol. iii., p. 379). "And it will hold much stronger in criminal cases, since, in the times of difficulty and danger, more is to be apprehended from the violence and partiality of judges appointed by the crown in suits between the king and the subject, than in disputes between one individual and another, to settle the metes and boundaries of private property. Our law has, therefore, wisely placed this strong and twofold barrier of a presentment (p. 281) and a trial by jury between the liberties of the people and the prerogative of the crown. . . . So that the liberties of England cannot but subsist so long as this *palladium* remains sacred and inviolate, not only from all open attacks (which none will be so hardy as to make), but also from all secret machinations, which may sap and undermine it by introducing

new and arbitrary methods of trial, by justices of the peace, commissioners of the revenue, and courts of conscience (pp. 220, 222). And however *convenient* these may appear at first (as doubtless all arbitrary powers, well executed, are the most *convenient*), yet let it be again remembered that delays and little inconveniences in the forms of justice are the price that all free nations must pay for their liberty in more substantial matters, that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution, and that, though begun in trifles, the precedent may gradually increase and spread to the utter disuse of juries in questions of the most momentous concern." (*Commentaries*, vol. iv., p. 349). Earl Russell is another panegyrist of the jury, and points out that it is a political power (*Essay on English Government*, c. 33, 1820).

## 12. Law and Fact

Broadly the distinction is clear. For instance, in actions for breaches of contract the dispute often is what the parties meant at the time by using or omitting a certain phrase or sentence. This is purely a question of fact, and when that is decided, there can be no possible doubt about the law. Or, the question is, through whose fault or negligence an accident was caused. Granted that it was some one's, that person may be clearly liable in law to pay damages. Again, whether or not there was a promise to marry is always a question of fact. But, on the other hand, suppose the only material question is the meaning to be put upon a word, or phrase, or clause, in a statute or a document, say

a lease<sup>1</sup> or a will. Or there may be no dispute whatever about the facts, the only question may be whether a certain contract to be valid must be in writing or not. Clearly these matters are matters of law, to be decided by lawyers, who know the cases on the statute or common law.<sup>2</sup> Now, for centuries the principle has been that a judge determines the law, and a jury the fact, and on this broad principle each case is sent to the appropriate tribunal. Where the parties agree to leave all issues in the hands of a judge sitting alone, effect is generally given to their wishes.

<sup>1</sup> It is said that Lord Brougham once said in the House of Lords that Lord Eldon referred to three courts below in succession to decide what a particular document was. The King's Bench decided it was a lease in fee; the Common Pleas, that it was a lease in tail; and the Exchequer, that it was a lease for years. Eldon, when it came back to him, decided that it was no lease at all. It is, perhaps, unnecessary to point out that the practical consequences of the respective decisions varied materially.

<sup>2</sup> "Among the various disputes and controversies which are daily to be met with in the course of legal proceedings, it is obvious to observe how very few arise from obscurity in the rules or maxims of law. An action shall seldom be heard of to determine a question of inheritance, unless the fact of the descent be controverted. But the dubious points, which are usually agitated in our courts, arise chiefly from the difficulty there is of ascertaining the intentions of individuals in their solemn dispositions of property; in their contracts, conveyances, and testaments. . . . The law rarely hesitates in declaring its own meaning; but the judges are frequently puzzled to find out the meaning of others. Thus, the powers, the interest, the privileges and properties of a tenant for life and a tenant in tail are clearly distinguished and precisely settled by law; but what words in a will shall constitute this or that estate has occasionally been disputed for more than two centuries past, and will continue to be disputed as long as the carelessness, the ignorance, or singularity of testators shall continue to clothe their intentions in dark or new-fangled expressions. . . . [Yet] these will bear no comparison in point of number to those which are founded upon the dishonesty and disingenuity of the parties. . . . And experience will abundantly show that above a hundred of our law suits arise from disputed facts for one where the law is doubted of."—Blackstone iii. 329. Perhaps there is a trace of professional bias here.

The instances here given of the distinction between law and fact are simple, but the distinction itself is one of the most difficult<sup>1</sup> met with in the practice of the law. For it is easy to see that many questions are at once questions of law and fact, for the reason that ordinary words used in expressing a law get into a legal atmosphere and contract, as it were, a special legal odour. For instance, one would imagine that it was a "fact" that a hairdresser was a tradesman, and exercised a business, and so a magistrate thought who fined one for breaking the Sunday Observance Act, 1677, which says that "no tradesman, artificer, workman, labourer, or other person whatsoever shall do or exercise any worldly labour, business or work of their ordinary callings upon the Lord's Day"; but two judges said this was a wrong interpretation of the clause, and remitted the penalty (*Palmer v. Snow*, 1900, 1 Q. B.). Again, laymen might think that whether a given structure was a scaffolding or not was a matter of fact; but under the Workmen's Compensation Act, 1897, this was not so. Whether a temporary staging is a scaffolding within the meaning of the Act was not a mere question of fact; "it is a mixed question of fact and law" (*Hoddinnott v. Newton*, 1901, A. C.). So in a well-known case in 1897, it was held that a ring on a racecourse was not "a place" within a Betting Act (*Powell v. Kempton Park*, 1897, 2 Q. B.). In none of these cases cited, however, had the facts been found by a jury. In 1894 a jury found that a certain course of conduct on the part of a wife constituted cruelty, but the House of Lords held that in law the facts did not establish cruelty (*Russell v. Russell*, 1897, A. C.). Again, where it is a

<sup>1</sup> "It is not, however, in many cases practicable completely to sever the law from the facts."—Lord Blackburn, *Metropolitan Railway Company v. Jackson*, 3 App. Cases, 207, 1877; cf. p. 106.



question on the facts of each case what is "reasonable," say, what is a reasonable time, it would seem to be peculiarly the province of the jury to decide this point; and so it is where there are no fixed rules of law, as, for instance, whether goods bought by sample have been rejected within a reasonable time, or whether shares to be transferred within a reasonable time have been so transferred. But where, in process of time and by dint of threshing a matter out in commerce and the courts, a rule has been bodied forth, then, apart from exceptional circumstances, the jury ought to adopt as a fact the established quasi-legal view of what is "reasonable," as, for instance, that the holder of a cheque or instrument payable on demand, in order to present it within a reasonable time, should do so on the day he receives it, or the next.

This difficult analysis cannot be pursued further here. Perhaps (it is humbly suggested) it would simplify discussion to say that the province of the jury is not so much fact as *conduct*; they ask themselves what some one did, or intended (if anything), or whether that was reasonable, and then the law pronounces on their finding.

On the whole matter may be cited a passage from a judgment<sup>1</sup> of Lord Mansfield's in 1783. "Where a question can be proved by the form of pleading, the distinction is preserved upon the face of the record, and the jury cannot encroach upon the jurisdiction of the court; when, by the form of pleading, the two questions are blended together, and cannot be separated upon the face of the record, the distinction is preserved by the honesty of the jury. The

<sup>1</sup> *R. v. Dean of St. Asaph*, 21 Howell's *State Trials*, 1039. Cf. L. Blackburn (*Dublin, etc., Rlwy. Co. v. Slattery*, 3 App. C. 1205. 1878): "A jury, no doubt, has the physical power to find a verdict contrary to the direction of the judge, but if that is done it is wrong." See a case on p. 110.

constitution trusts that, under the direction of a judge, they *will not usurp* a jurisdiction which is not in their province. They do not know, and are not presumed to know, the law; they are not sworn to decide the law, they are not required to decide the law. . . . It is the duty of the judge in all cases of general justice to tell the jury how to do right, though they have it in their power to do wrong, which is a matter entirely between God and their own consciences."

### 13. The Jury, Common or Special?

Trial by jury "hath been used time out of mind in this nation, and seems to have been coeval with the first civil Government thereof" (Blackstone). For the agreement and number of jurors, viz., twelve, a learned commentator on Blackstone, iii. 376, remarks: "The unanimity of twelve men, so repugnant to all experience of human conduct, passions, and undertakings, could hardly in any age have been introduced into practice by a deliberate act of the legislature," and goes on to point out that it is reasonable that life, liberty, and property ought not to be at the mercy of any small majority of voters; there ought to be a fixed minimum for condemnation, and twelve was the number chosen, and he conjectures that, "as less than twelve, if twelve or more were present, could pronounce no effective verdict, when twelve only were sworn, their unanimity became indispensable." Sir Frederick Pollock puts it down to "the inherent sanctity of the number twelve" (*Expansion of the Common Law*, p. 95). Grand juries will be mentioned under Criminal Law (p. 280).

The old superstitious reverence (p. 65) for trial by jury<sup>1</sup> is, perhaps, passing away. The inherent flaw in the system is that the members of a jury, being drawn directly from the people, naturally share and reflect their feelings and prejudices, which, in times of excitement, political, religious, or "patriotic," e.g. notably during a war about the righteousness of which opinion is divided, are certain to bias many persons irrationally against those of an opposite party, and in favour of those of their own. A fearful example—even of panic—was supplied during the alleged "Popish Plot" in 1678. To quote Sir Walter Scott: "Said Julian, My father's cause will be pleaded before twelve Englishmen." "Better before twelve wild beasts," answered the Invisible, "than before Englishmen, influenced with party prejudice, passion, and the epidemic terror of an imaginary danger. They are bold in guilt in proportion to the

<sup>1</sup> Cf. Lord Halsbury, *De Freyne v. Johnston*, 20 T. L. R. 454, in 1904 and —. "I believe the jury in civil causes to be a survival and an anomaly, and that if it were abolished a vast accumulation of superfluous technicalities would disappear with it, the general result of which could only be that justice would be rendered as efficiently, more simply, more intelligibly, and with much greater expedition than is the case at present": *The French Law of Evidence*, by O. Bodington, a member of the French, United States, and English Bars, ch. ix., where it is stated that in French civil litigation juries are unknown, and there is very little oral evidence. Yet "the French system is almost equally efficacious, and would be quite as efficacious," in the opinion of Mr. Justice Brewer, an American judge, "when coupled with the guarantee of oral evidence in open court with cross-examination" (*ib.*). That French juries in criminal cases are subject to *extraneous* sentiments perhaps appears from the clean acquittal of Mme. Caillaux for a deliberate murder in July, 1914. Perhaps a non-Anglo-Saxon has too much imagination and an Anglo-Saxon too little. In France, "Trial by jury, we are told, is a joke, and as far as the interests of the public are concerned a very bad joke." Dicey, *Constitution* (1915), p. 397, where (p. 389) is cited, a French opinion about our jury, "the success of which in England is wholly due to and is the most extraordinary sign of, popular confidence in the judicial bench." Trial by jury naturally takes more time than trial by a judge; see p 79 n. Hence it almost fell into desuetude during the war.

number amongst whom the crime is divided" (*Peveril of the Peak*, ch. xxxv.). This is violent language, but there is an element of truth in it. In cases of *local* excitement, the law makes adequate provision for transferring the trial of a charge when the accused is not likely to get fair play in a given district (p. 78).

Later, Bishop Burnet says (of his troublous times, about 1700), "There are loud complaints of that which seems to be the chief security of property—I mean juries—which are said to be much practised upon" (*History of His Own Times*, p. 659). Perhaps this is illustrated by Pepys: "And so to Mr. Beacham the goldsmith, he being one of the jury to-morrow in Sir W. Batten's case against Field. I have been telling him our case, and I believe he will do us good service there" (*Diary*, June 2, 1663). Compare what Mr. John Morley says of Parnell: "He had stood his trial for criminal conspiracy, and was supposed only to have been acquitted by the corrupt connivance of a Dublin jury" in 1881 (*Gladstone*, Book IX., ch. i.). In 1845 Lord Cockburn wrote of Scotland in "the railway mania": "Even juries, our former shields, have been obliged to be superseded as the guardians of private interests because it is found impossible to get fair ones" (2 *Memorials*, c. xii.).

The acquittal of Bernard, charged at the Old Bailey in 1858, with murder, and conspiracy to murder Napoleon III., was undoubtedly due to political prejudice—a "scandalous" verdict, Sir Spencer Walpole calls it. He cites a "witty American authoress" as calling a jury "the cussedness of one man multiplied by twelve" (*History of Twenty-five Years*, i. p. 125). Moreover, in society there are latent prejudices against particular occupations and avocations, and, at the best, these are silenced with an effort in the jury-box.

When once it is decided that there is to be a jury, either side may demand that it be special. "Special juries," says Blackstone, "were originally introduced in trials at bar, when the causes were of too great nicety for the discussion of ordinary freeholders, or where the sheriff was suspected of partiality, though not upon such apparent cause as to warrant an exception to him."

Now special juries are generally claimed by litigants who prefer that their cases should be heard by persons of their own social standing, or of one nearer to it than those of whom the bulk of common jurors consists, either because they believe that the class from whom the special jurymen are drawn, viz. "esquires, or persons of higher degree, or bankers, or merchants," are men of greater intelligence, or that they are free from the prejudices which they fear in a distinctly lower grade<sup>1</sup> of society. Practically, any one who is a householder may be on the common jury list. It is a popular error that persons on the special jury list are not liable to serve on common juries; they are liable. The extra expense<sup>2</sup> of a special jury is borne as the judge after the trial directs. (See p. 283).

<sup>1</sup> "We sympathise only with those who dress like ourselves, whether the habit be of ideas or broadcloth."—Mr. Justice Darling, in *Scintillæ Juris*: "Of Examining in Chief."

<sup>2</sup> "A special jurymen is only allowed for his services such sum not exceeding one guinea, as the judge who tries the case thinks just and reasonable, except in cases where a view has been . . . taken. . . A special juror gets one guinea for each case, whether tried out or not, and however long it lasts. A special juror is entitled to one guinea per day if sworn in to take a view. A common jurymen is entitled to five shillings a day for a view, but otherwise he is at law not entitled to any payment. It is usual, however, in the High Court to give a fee of one shilling, and in the counties eightpence. No fee is allowed in a criminal case" [i.e. the old duty of personal service to the country survives; the Crown demands it, not merely another party, as in civil suits]. "The fee in the county court is one shilling per case; in the Mayor's court twopence," etc. *Encyclopædia of Laws*: "Jury," p. 579. A coroner's jury has no legal claim to a fee, but the local authorities generally allow a trifle.

Enough, perhaps, has been said about the preliminaries to a trial. We have not to do here with the work of "getting up a case," which each side has to consider; it chiefly consists in determining what evidence will be necessary to prove or rebut a given case, in discovering what witnesses can be brought forward, and exactly what they know relevant to the inquiry, and in procuring or looking out the necessary documents. If, for any reason, the parties come to terms before the trial, it is part of the agreement whether these terms shall be formally adopted in the judgment of the court, or whether the whole matter shall be withdrawn from the jurisdiction of the court. In any case, the court will never, in a civil cause, oppose a settlement without its intervention; indeed, it will encourage it. But a criminal prosecution cannot be withdrawn without the consent of the court (p. 260).

## 14. Open Court or 'In Camera'

All trials (almost without exception) must be in open court, and all judicial proceedings may be public. Originally this practice was a safeguard—and perhaps the only one—against royal oppression or official corruption working with such instruments as *lettres de cachet*<sup>1</sup>; now perhaps its chief value is as an additional deterrent to wrongdoers.<sup>2</sup> Against this, however, must be set the reluctance

<sup>1</sup> Compare the old stories about the German Wehm-Gericht, or the modern ones about Italian secret societies, or some Russian tribunals. Secrecy must sooner or later lead to injustice. With us, the jury which theoretically represents the country in criminal trials is practically a public.

<sup>2</sup> Mr. John Morley mentions in his *Life of Gladstone* that the latter was in favour of prohibiting publicity in the proceedings of the divorce court "until he learned the strong view of the President of

which many people feel to have their private affairs discussed in public, so that even right-doers are deterred from coming into court; but probably this centrifugal force is not for frequency comparable with the former. Judicial debate, too, has an educational value for all auditors, lay and legal. It is obvious that it is only exceptionally that publicity will do more harm than good.

Chief among the exceptions is naturally the case where a particular publicity is what one of the parties seeks to avoid, e.g. when in 1883 "a secret trade process" was in dispute, and when in 1885 a solicitor threatened to disclose the affairs of a client, the hearings were with closed doors. "Cases," said a judge,<sup>1</sup> in 1894, "relating to lunatics are constantly heard in private, and cases about wards . . . in order that the lunatic or ward may not be prejudiced," and apparently family disputes in Chancery, by consent, may be added. But this rare privacy rests rather on practice than on law, even in "cases in which," as the judge puts it, "public decency and morality require it."<sup>2</sup> After some doubt an exceptionally strong House of Lords (overruling the Court of Appeal and the judge of first instance) distinctly decided that not even "in the interest of public decency" may the golden rule be suspended (except when

the Court, that the hideous glare of this publicity acts probably as no inconsiderable deterrent."—Bk. IV. ch. viii., note. "It was not at all a disadvantage," said the President of that Court—"quite the contrary—that publicity should be given to this class of case, for it brought the matter home to everyone" (*The Times*, July 26, 1905, *A. v. A. and N.*).

<sup>1</sup> *In re Martindale*, 3 Ch. 200. See "In Camera" in *Encyclopædia of the Laws of England*.

<sup>2</sup> In Warren's *Ten Thousand a Year* (1841), B.3c. 4 Snap sends Titmouse orders for Old Bailey trials: "for so it happens that in this country the more hideous the crime the more intense the curiosity of the upper classes of both sexes to witness the miscreant perpetrator, the more disgusting the details the greater the avidity with which they are listened to by the distinguished auditors," etc.

it "must yield to the paramount duty of the court to secure that justice is done," i.e. in such rare cases as those just mentioned and a few others, and, of course, where Parliament has distinctly decreed privacy, as of certain hearings under the Children Act, 1908, and of trials of an offence made a crime *for the first time* by an act in 1908: 8 Edw. 7. c. 45): *Scott v. Scott*, 1913 A. C. 417. But in cases of shocking incidents, generally, judges practically achieve the same end by a simple request to all (sometimes only to women and children) who are not compelled to remain, to depart.

## 15. The Judge not in Court

But the duties of a judge are by no means limited to trying actions. There are innumerable orders he can and does make, and powers he can and does exercise, when he is not sitting in court, and even without hearing the other side; for instance, when there is great urgency. And in emergencies, and when few judges are available, the privacy of a judge's home or holiday<sup>1</sup> must perforce be invaded. Shakespeare makes the Lord Chief Justice, in a public street, first threaten to, and then actually, commit Sir John Falstaff to prison.<sup>2</sup> The judges, in fact, are always clothed with their authority, and some of it may be exercised privately, as, for instance, is all their jurisdiction—and that of their deputies and subordinates "in chambers"—preliminary to trial (to which reference has so frequently been

<sup>1</sup> On one occasion, in a long vacation, counsel, who wanted a judge's order, at the earliest possible moment, for some vital purpose, pursued Shadwell, "the last Vice-Chancellor of England," to a creek near Barn Elms, where he was bathing, stated his case, and got his order (*Dict. Nat. Biog.*).

<sup>2</sup> 2 *Henry IV.*, act i. sc. 2, and act v. sc. 5.



made) or after it. As a matter of fact, the general public never does attend such hearings, but any curious person, with no improper or dishonest intention, would practically have no difficulty in obtaining admission. Of course, in preliminary manoeuvres much is discussed which need not, and would not, be made public, unless and until there is an open trial; and if either party is anxious to secure himself from premature divulcation to unprivileged ears, he will not have the smallest difficulty in securing the absence of everybody but his opponent. But, in the great majority of such cases, probably no one concerned would make the smallest objection to the presence of spectators, if any wished to attend. There seems, however, to be no doubt that the presiding official has an absolute right to exclude any one but the parties.

## 16. Place of Trial

In other than County Court actions, the suer may select the place, his choice being practically limited to the nearest assize town or London; but his option is exercised subject to the control of an official, who will see that the sued is not put at an unfair advantage, and will, if necessary, fix the place himself. Thus a man in Cornwall, suing one in Devonshire, would not be allowed to "try" in Northumberland; he would probably be restricted to the assizes of either county. And if his opponent was in Northumberland, it might be fair, having regard to cost and the balance of convenience, to try in London. And trials are frequently ordered in London where the delay till assizes would be too great, or there are other special reasons for despatch, or the expense and inconvenience would be sensibly less by doing so.

In the County Court (speaking quite generally) the action must be brought in the district where the sued dwells or carries on business; but for this purpose practically all London is one, and a suer (who lives or carries on business in any part) may, if he chooses, proceed in his district and not in his opponent's. The rule is designed to save trouble and expense to any one wrongly sued; if he is rightly sued, on the other hand, he must pay the travelling costs of the winner. Of course, the rule contemplates permanent residence; a temporary sojourn in gaol, for instance, will not do, though it was set up in one case.<sup>1</sup>

In criminal matters the place of trial is pretty rigidly determined by the county in which the crime is alleged to have been committed; if some are alleged in one county and some in another, each may have to be tried in its proper place, but dealing with all charges at once and by one sentence is, where possible, encouraged—"winding up the moral bankruptcy," it has been called. If justice requires it, e.g. when local feeling is inflamed, a prisoner may be tried out of the county; thus Palmer, the Rugeley murderer, was tried in 1856 at the Central Criminal Court, where most of such transferred cases go.

## 17. The Trial

There is little to be said on the form or order of proceedings at a trial, but a few points<sup>2</sup> may be noticed.

Counsel or the party makes an opening speech,<sup>3</sup> explaining

<sup>1</sup> *Dunston v. Paterson*, 5 C. B. N. S. 267, in 1858.

<sup>2</sup> Nothing is said about "challenging" jurors in civil cases, as it is of no practical importance in England, Scotland, or Wales, but see p. 285.

<sup>3</sup> And so throughout—one or the other, but not both.

what his case is, and indicating what evidence he proposes to call. It must be remembered that this is the first time the other side hears officially exactly the case proposed to be made out against them; and though very often they can guess what this will be, yet sometimes the information they thus acquire is important and valuable; for instance, they hear the names of the witnesses against them, and may prepare accordingly. The statement of counsel is, of course, unsworn, and if he has reason to suppose that he will not be able to call a certain witness, or put in certain evidence, he must not allude to that testimony, for his only right at the moment is to indicate what he will prove, and he has no right to influence the minds of his hearers by anything that he cannot prove. And thus another and a logical purpose is served by this speech; for the judge and the jury get a picture or bird's-eye view of what they are to inspect more closely, and understand better the idea they are invited to form from all the parts put together than they could from a consideration of those parts individually without this interpretation. Indeed, in a long and complicated case some such presentation is necessary to enable the jury<sup>1</sup> to take any connected view at all, and in a short and simple case it can do no harm. Whenever the great Faraday was to be shown an experiment, he used to say, "Now tell me what I am going to see," i.e. what do you propose to establish? If he did not know this he might not carry along with him the exact materials relevant to the conclusion, or, when that end was reached or

<sup>1</sup> And, though in a much less degree, the judge. It must always be remembered when the tribunal is a judge the whole proceedings are conducted by trained lawyers, accustomed to the same habits of thought, speaking the same scientific language, knowing the rules and assumptions by which they are bound. Thus much time, explanation, and formality are often saved which must be expended on a jury.

suggested, might not remember whether the essential steps had been taken.

In the same speech, if there be any question on the law applicable to his facts, counsel will tell the court his view of the law, and submitting that, if he proves the facts he has sketched, the law entitles him to a verdict. The judge may take the contrary view, and in a clear case may declare that, even if the facts opened were fully proved, he should have to direct the jury that the law prevented them giving the suggested verdict. After such an opinion it would be useless to continue the case, and thus time and, probably, expense are saved. Appeals from such and other decisions will be dealt with separately.

After the opening speech, the witnesses on the same side are successively called. They, if they are compellable by law, may be summoned by an easy process, if they are well enough, to come, as is only just, when their reasonable expenses are paid, i.e. they will be punished if they disobey. In a civil case, one of the parties pays; in a criminal case, almost always, some public fund; but in the latter, owing to its greater gravity, attendance as a witness is "in the nature of a public duty" (Short and Mellor, *Crown Office Practice*, p. 407), and expenses need not be paid before the trial unless the witness is too poor to travel without them. Every human being (except, perhaps, the sovereign)<sup>1</sup> is, in a civil case, a *competent* witness (not quite always the same as *compellable*), if he or she is not a person devoid of sufficient understanding to know what he or she is about.

<sup>1</sup> Taylor on Evidence, 11th edition, sec. 1381. It is also obviously inconvenient that any one taking part in the conduct of a case in court—judge, counsel, juror, or officer of the court—should also appear therein as a witness, and such a thing is practically unknown; but it is not expressly and theoretically forbidden. At the trial of the Earl of Essex in 1600, a peer who was a member of, and a judge advising, the Court (the Lords), gave evidence. 1 *State Trials* 1340, 1342.

It is the business of the judge to satisfy himself that a given person called has sufficient understanding to know what he is about,<sup>1</sup> and there is no practical difficulty in ascertaining this in the case of persons mentally affected or drunk at the moment. His duty is the same in the case of children of tender years, but it is more difficult to perform. He generally puts a few questions to the child directed to test its intelligence and sense of duty to speak truth<sup>2</sup>, e.g. the following dialogues have led to the infant's admission as a witness: "What becomes of a liar?" "He goes to hell." "Is it a good or a bad thing to tell lies?" "A bad thing."

The universality of the general principle of the competency of every human being to testify in our courts is founded on a colossal philosophic induction that by far the greatest part of what falls from human lips is true,<sup>3</sup> and by a narrower one that there are two great safeguards for the truth, the oath and cross-examination. It by no means follows that every one who may be competent to depose can be compelled by law to do so. The sovereign (even if competent) certainly cannot, nor can an ambassador or diplomatic agent who represents a foreign sovereign (for *he* could not were he in this country), nor any of such representative's suite (for they are identified with him). Nor, of course, can persons outside the jurisdiction of the courts of England, Scotland, or Ireland be so compelled; nor will any person not physically fit to attend be compelled to do so.

<sup>1</sup> Taylor on Evidence, 11th edition, ss. 1375-6.

<sup>2</sup> "In practice it is not unusual to receive the testimony of children of eight or nine years of age when they appear to possess sufficient understanding" (*ib.*, sec. 1377).

<sup>3</sup> "This principle has a powerful operation even in the greatest liars, for where they lie once they speak truth a hundred times" (Reid cited by Taylor, *ib.*, sec. 50).

Still, speaking generally, there is a process to enforce<sup>1</sup> (after payment of reasonable travelling expenses) the presence of any one in these islands, or of documents in his or her possession, unless the court has reason to believe that an abuse of this facility is being attempted, and proper arrangements can be made to take the evidence<sup>2</sup> of persons unable to attend the hearing through illness or absence in another country, wherever they are, and to use it as their substitute, so to say, at the hearing. But such substitutes are not encouraged, for a judge or a jury may fairly draw conclusions about the veracity of a witness from his demeanour in their presence, and though, perhaps, such scanty observation may be a fallible guide, still, there are many occasions when persons may be seen to be obviously speaking falsehood by merely looking at them.

But even when the witness is in the box, it is by no means always just that he should be compelled to answer every question relevant to the inquiry. But of the law of evidence<sup>3</sup> we shall speak hereafter (p. 186).

## 18. The Oath

This institution certainly came into this country through the Bible in the train of Christianity. The experience of many centuries has shown that some form of adjuration does, as a matter of fact, secure greater truthfulness in some

<sup>1</sup> By punishing disobedience; no tribunal can make a man speak.

<sup>2</sup> On oath, and subject to cross-examination, so that the only element missing in court is demeanour.

<sup>3</sup> There is a story that a litigant in person, who naturally did not know the technical rules of evidence, and was constantly stopped from infringing them, exclaimed—"Thank Heaven, on the day of judgment there will be no rules of evidence, and then there will be some chance of the whole truth coming out!"

classes of people and less in none, and as it is the special business of the law to discover the truth, in view of its effects on life, honour, liberty, and property, no one with a trifling exception (in criminal law, but without any in civil) who is a witness is exempt from some such solemnity,<sup>1</sup> though its form is almost, in respect of the religious element in it, a matter of individual taste. Everybody agrees that deliberate untruthfulness in a witness designed to defeat the ends of justice should be punished by law, and while it is true that such a sanction can exist equally well without, as it has been put by objectors to any formal exhortation, setting up "two standards of truth," still, if people have two, the law prefers the higher. The exception referred to (to anticipate the section on criminal law) is equally made in order to do justice, for, in the case of certain personal offences against children of tender years, if the offenders could not be convicted because their victims did not understand the nature of an oath, in many cases they could not be convicted at all. Such children, therefore, are heard unsworn, provided, as in other cases (p. 81), the court is satisfied of their intelligence and veracity. But no one can be convicted without material corroboration of such evidence, and such witness, if perjured, is liable to punishment.

<sup>1</sup> "The defendant, being in contempt for not answering, was brought by several orders to the bar; and being indeed a Quaker, refused to answer on oath, but prays to answer without oath. Lord Chancellor did admonish him of the peril, viz. that the bill must be taken for true entirely as it is laid if he answered not," and it was: 2 *Cases in Chancery* 237, 1677. (See p. 290 n.).

## 19. Examination & Cross-Examination

It is obvious that the witness must tell his own story; but in order to prevent his wandering from the point, or being too discursive (as an untrained narrator is very apt to do or be), and, moreover, in order to direct his attention to points which he might forget, or of which he might not see the bearing on the case, his evidence is generally called forth by the questions of counsel who called him, and who almost invariably has before him a written statement of what the witness has previously said on the matter. The essential thing that he should tell his own story is largely secured by the fundamental rule, that the questioner shall not put leading questions; that is, shall not put words into the witness's mouth on any material point, for the latter can easily tell from the form of the question what answer is *desired*, and with this he ought to have no concern. For instance, the interrogator ought not to ask, "Did you hear A. promise to pay B. £10 for a watch?" for that plainly invites the answer "Yes" (supposing the point to be a material one in dispute); but, "Did you on one occasion hear A. and B. speaking together?" "If so, what did A. say?" Then, "What did B. say in reply?" "Did you hear a price mentioned?" "If so, by whom?" and so on. But, of course, not every trivial point is to be approached thus guardedly, as, for instance, "What is your name?" "Where do you live?" "Did you, then, write to A.B.?" where it may be safely assumed (but not otherwise) that the answer to any of these questions cannot affect the issue. If, for instance, it is important to establish that the witness did then write to A. B., the question should be, "What did



you do next?" or, "What step did you then take in reference to this matter (or to A. B.)?"

And, in any case, either side can at any time object to the judge against any proposed question.

It is true that, as has been said, the examiner knows from the papers in his hand what answer the witness will *probably*<sup>1</sup> make to his question, and cannot, therefore, expect to get any unfair advantage by the form of his question; but there is at least a possibility (and often experience shows that it is the fact) that the lawyer or other person who took down that statement misunderstood some matter or unconsciously read in his own suggestions or, generally, gently assisted the deponent. Or, in the interval between making the statement and going into the box, the latter's recollection may have improved. In any case, herein is one of the advantages of the public punctiliousness of a trial, and, no doubt, of the intervention of the oath; the whole scheme warns the witness to be careful, and gives him abundant opportunity to revise any former inaccuracy in respect of the matter. On the other hand, the novelty of the scene in court tends to perturb a nervous witness; but this state of mind a prudent counsel can do something to allay.

After examination comes—

## 20. Cross-Examination

The other side may now, if it chooses, take the witness in hand with a view to showing either that he is untruthful or mistaken, or that a different colour may be put on his facts from that which is sought to be put. It is hardly

<sup>1</sup> A great lawyer, when at the bar, used to say: "I don't care a straw about the witnesses against me; it's my own I'm afraid of," i.e. they could do the case so much harm and he could not cross-examine them.

possible to over-rate the importance of this testing instrument. "It is not easy for a witness subjected to this test to impose on a court or jury,<sup>1</sup> for, however artful the fabrication of falsehood may be, it cannot embrace all the circumstances to which a cross-examination may be extended" (Taylor, *Evidence*, sec. 1428). He cites Bacon's *Essay on Cunning*: "A sudden bold and unexpected question doth many times surprise a man and lay him open. Like to him that, having changed his name, and walking in Paul's, another suddenly came behind him and called him by his true name, whereat straightways he looked back."

There is a story that counsel, despite great pressure, failed to make a witness admit what was essential to the client's case—that he had been in the army. Suddenly he said "attention," and the man instinctively obeyed the word of command.

"The object of cross-examination," says Mr. Phipson, "is twofold—to weaken, qualify, or destroy the case of the opponent<sup>2</sup>; and to establish the party's own case by

<sup>1</sup> It is, of course, much easier to deceive when evidence is given merely by affidavit (i.e. on written oath, so to say), as is the rule in most preliminary processes out of court (and as happens exceptionally in court). This is, perhaps, the amount of truth in the famous epigram of a cynical judge: "The truth will occasionally leak out, even in an affidavit," i.e. where there is no cross-examination. So Lord Bowen says of the old Court of Chancery, "It tossed about as hopelessly," in cases of conflicting testimony, "as a ship in the trough of the sea for want of oral testimony—a simple and elementary method of arriving at the truth, which no acuteness can replace" (Ward's *Reign of Queen Victoria*, vol. i., p. 290). Compare what is said of the French civil system, p. 71 n.

<sup>2</sup> If Anthony Trollope had been aware of this he would not have blundered (as so many novelists do when they use *legal machinery*) in a dialogue between a judge and a young barrister. The former says: "Mr. Chaffanbrass . . . is perhaps unequalled in his power of cross-examining a witness." "Does his power consist in making a witness speak the truth or in making him conceal it?" "Perhaps in both" (*Orley Farm*, vol. ii., c. 8). For the ethics of advocacy see p. 196 n. and p. 289 n.

means of his opponent's witnesses" (*Evidence*, 6th edn., 1921, ch. xl.).

The situation is the converse of that in examination, for, presumably, the witness, so far from wishing to help his questioner, wishes to hinder him. Consequently, almost all the restrictions on interrogation there in force here disappear, and it may be broadly stated that, subject only to the general control of the judge, any question may be asked by one side of a witness (not defendant in a criminal case) called by the other, including those which though otherwise irrelevant tend "to impeach his credit" by attacking "his antecedents, associations, character," or to showing "that he has been convicted of any criminal offence" (Phipson, *ib.*). Evidence may be called to establish such a conviction, though, on the other points, his answers may not be contradicted, for that would lead too far afield—unless, indeed, the particular subject is immediately relevant to the issue, for then the attack on credibility is something more than collateral to the issue. For instance, evidence may be always given to show that a witness's general reputation is such that he ought not to be believed on oath, for that goes to everything he has sworn.

The principles underlying these regulations are admirably put by the authority so often cited. "The rule [of not contradicting] is founded on two reasons, first, that a witness cannot be expected to come prepared to defend, by independent proof, all the actions of his life; and next, that to admit contradictory evidence on such points would of necessity lead to inextricable confusion by raising an almost endless series of collateral issues. The rejection of the contradictory testimony may, indeed, sometimes exclude the truth; *but this evil, acknowledged though it be, is as nothing compared with the inconveniences that must arise were a*

*contrary rule to prevail*" (Taylor, sec. 1439)—another instance of the law recognising a balance of advantages. Again, "no doubt, cases may arise where the judge, in the exercise of his discretion, would properly interpose to protect the witness from unnecessary and unbecoming annoyance. For instance, all inquiries into discreditable transactions of a remote date might, in general, be rightly suppressed, for the interests of justice can seldom require that the errors of a man's life, long since repented of, and forgiven by the community, should be recalled to remembrance at the pleasure of any future litigant." So questions respecting alleged improprieties of conduct, which furnish no real ground for assuming that a witness who could be guilty of them would not be a man of veracity, might very fairly be checked.

But no protection of this sort should be extended to cases where the inquiry relates to transactions comparatively recent, bearing directly upon the moral principles of the witness and his present character for veracity. In such cases as these, a person ought not to be privileged from answering, notwithstanding the answer may disgrace him. It has indeed been termed a harsh alternative to compel a witness, either to commit perjury or to destroy his own reputation; but, on the other hand, it is obviously most important that the jury should have the means of ascertaining the character of the witness, and of thus forming something like a correct estimate of the value of his evidence. Moreover, it seems absurd to place the mere feelings of a profligate witness in competition with the substantial interests of the parties in the cause (Taylor, secs. 1460-1). The same writer mentions the following instance in Ireland. A witness professed to be unable to speak English, and gave his evidence in Irish through an interpreter—"no

slight advantage to a dishonest witness." In cross-examination he was pressed about his knowledge of English, and finally asked whether he had not just before spoken English to persons then in court. He denied this, and seven judges held that these two persons could not be called to confute him, while three thought they could.

But there are some questions which may be properly asked, but yet need not be answered. The excuse, "I am not bound to incriminate myself," for declining to answer a question is well known, and is allowed by the law "on the policy of encouraging persons to come forward with evidence in courts of justice by protecting them as far as possible from injury or needless annoyance in consequence of so doing" (Phipson,<sup>1</sup> *Evidence*, ch. xvi.). That is, the witness need not expose himself, or herself, or his wife, or her husband to "any criminal charge, penalty, or forfeiture" of property by his or her answer, however material to the case it may be. But the exemption is confined to the apprehension—of the validity of which the court must judge—of these special consequences, and not of others, e.g. the admission of a debt. And answers even incriminating are now sometimes compellable, notably concerning offences in bankruptcy, some forms of larceny and fraud and libel, subject to the sensible compromise just referred to; and concerning the criminal charge being tried, when the accused gives evidence.

Public policy also exempts, on obvious grounds, such witnesses as the following (at their option) from answering questions relating to their official duties: ministers and other officers of State, heads of Government departments,

<sup>1</sup> Who adds, "A sensible compromise has, however, been adopted in several modern statutes by compelling the disclosure, but indemnifying the witness in various respects from its results."

prosecutors for the inland revenue (about their informants), judges, jurors, counsel and solicitors (about confidential communications with a lawful object from clients), husband and wife (about communications *inter se* during marriage), and in some other cases. It is easy to see that, in the former of these cases, answers might be prejudicial to the public service, and in some of the latter to domestic peace. The individual party who seeks the aid of the answer which is not forthcoming, no doubt, may suffer; but here again, on a balance of the general disadvantages against the particular advantage, the law decides on suppression. Practically, in all these cases, the persons called decide for themselves (unless the interest of some third person, such as a client is involved, in which case his consent must be obtained), and if they waive their privilege no one will assert it. In effect, all the matters suppressed are, and ought to be, secrets, and only the owners of them have any right to say whether or when they shall be divulged. It is perhaps worth mentioning that a cross-examiner ought to put to the witness any matter (such as a letter, an interview, or what not) of which he has cognisance, and of which he (the cross-examiner) proposes to call evidence later; for it is only fair that the witness should have an opportunity of explaining or contradicting, and normally he is only in the box once. In short, one party has no right suddenly to "spring" something on the other when he has had and omitted the opportunity of getting an explanation.

The elaborate rules (to which there is not space for further reference in detail) for cross-examination show that it has always been considered of momentous importance. As an art, it depends entirely on the supply of materials. In the absence of information about a witness, it may be absolutely impossible to shake him in the slightest degree;

with plenty, it may be quite easy. Still, when there is nothing conspicuous to seize on, art will be displayed in watching the witness alertly, in fastening on the smallest discrepancy,<sup>1</sup> and in developing the dialogue<sup>2</sup> in a direction where and towards topics on which, it is hoped, he may throw light. The last few sentences are illustrated by the following story from Mrs. Henderson's *Recollections of John Adolphus*, her father, an eminent barrister (p. 156). "Two Lascars were on their trial for the murder of the captain of a ship, the evidence of the mate seemed quite conclusive. In the course of it he said, however, that at the time of the murder there was great confusion, as the ship was in much peril, and requiring all the attention of the sailors to prevent her striking on a rock. My father, who defended the prisoners, asked so many questions about the exact number of the crew, and where each man was, and what he was engaged in during the perilous time, that at

<sup>1</sup> Serjeant Ballantine once "smashed" a will, of the signature of which there was great suspicion, but absolutely no evidence to justify it. The cross-examiner had the second attesting witness out of court while he examined the first, and, by eliciting a large number of discrepancies in small details between the two versions, discredited both of them.

<sup>2</sup> As good an instance as any of "leading on" is supplied by a cross-examination of Lord Chancellor Halsbury's when at the bar (the Shrewsbury Election Petition, 1870?). A witness swore positively that a well-known person, X., had sought to bribe him during an election to vote for a candidate. Counsel ascertained that this person would deny this on oath. He then asked the witness a series of questions to show that he had not mistaken the man, thus: "Perhaps you only saw him side face?" "No, I saw him full face." "Was it similarity in his clothes, or something of that sort, made you think it was Mr. X.?" "Not at all." "You are sure it was Mr. X.?" "Quite." In due course Mr. X. showed conclusively that he was miles away from the place at the alleged time. If counsel had not first pinned him to a particular man beyond chance of revocation, he would probably have said, when Mr. X. appeared, "This is not the man; I have mistaken his name," and his lie, as it undoubtedly was, would not have been detected.

last the judge whispered, 'I suppose, Mr. Adolphus, the questions are to the purpose? I own I do not see it,' thinking, doubtless, the time of the court was being wasted. After a few more questions on the special duty each man was performing, the witness had accounted for every man on board, the captain being below, and the two prisoners murdering him. My father fixed his eye steadily on the witness, and said in a searching and loud tone, 'Then, who was at the helm?' The wretched mate dropped down in a fit, and soon after confessed he was himself the murderer. In his false evidence he had given to each his position, and forgotten the most material, or rather left none to fill it. Nothing but a perfect knowledge of the requirements of a vessel in this dangerous position could have saved these unfortunate men.' A vivid imagination may suggest questions which would not occur to every mind.

One of the best illustrations of cross-examination in the English language is in fiction, viz. in the *Tale of Two Cities*, ch. iii.; the slight touch of parody serves as a hint that cross-examination may be carried to excess. The informer, Barsad, is witness against a prisoner charged with treason. "Had he ever been a spy himself? No; he scorned the base insinuation. What did he live upon? His property. Where was his property? He didn't precisely remember where it was. What was it? No business of anybody's. Had he inherited it? Yes, he had. From whom? Distant relation. Very distant? Rather. Ever been in prison? Certainly not. Never in a debtor's prison? Come, once again. Never? Yes. How many times? Two or three times. Not five or six? Perhaps. Of what profession? Gentleman. Ever been kicked. Might have been. Frequently? No. Ever kicked downstairs? Decidedly not; once received a kick on the top of a staircase, and fell



downstairs of his own accord. Kicked, on that occasion, for cheating at dice? Something to that effect was said by the intoxicated liar who committed the assault, but it was not true. Swear it was not true? Positively. Ever live by cheating at play? Never. Ever live by play? No more than other gentlemen do. Ever borrow money of the prisoner? Yes. Ever pay him? No. Was not this intimacy with the prisoner in reality a very slight one, forced upon the prisoner in coaches, inns, and packets? No. Sure he saw the prisoner with these lists? Certain. Knew no more about the lists? No. Hadn't procured them himself, for instance? No. Expect to get anything by this evidence? No. Not in regular Government pay, and employed to lay traps? Oh dear, no. Or to do anything? Oh dear, no. Swear that? Over and over again. No motives but motives of sheer patriotism? None whatever."

Perhaps a word may be devoted to the abuse of cross-examination. If the preceding pages are clear, it will readily be believed that there is no more difficult duty than that of cross-examining, chiefly by reason of the judgment required in knowing what *not* to ask.<sup>1</sup> It must be admitted that the practice is abused, but the wonder is that it is so little abused. In the first place, there is a natural anxiety on the part of the advocate<sup>2</sup> to do his very best for his client, and if he has no reason to doubt the accuracy of the information supplied to him, he tends to get all the advantage he can from it, to discredit the witness. That information

<sup>1</sup> "Everybody knows that there is no interrogatory so effectual in detecting guilt as that which is put by a steady and searching eye. A man who is skilful in this respect will keep up a sort of silent cross-examination of a person all the time he is giving evidence for the opposite party."—*Amicus Curiae* (see p. 49 n.<sup>1</sup>) on "Mr. Topping."

<sup>2</sup> See an amusing article on "Cross-examination," by Lord Bramwell, in *Nineteenth Century Magazine*, for February, 1892, and Wellman, "Art of Cross-examination," 1906, American. Taylor

is often full of mere suspicions and hearsay (collected by the zeal of the compiler, in his turn, for the client); but in using such hints the cross-examiner may fairly assume that the character opposed to him, if the expression may be used, is not perfect, and, if he thinks it worth while, he is entitled to use all his material. Indeed, sometimes he is bound to do so, as in the case of previous misconduct, or convictions bearing directly upon the issue—occasions among the most painful he has to face. Another source of anxiety to the cross-examiner is the disparagement of, or the attack on, a third person, who cannot be represented in court. Such a course may be absolutely imperative, owing to the witness's connection with a notorious wrong-doer, but references of that sort should be limited to the condemnation of some recognised authority (e.g. a court, a club or society of repute, etc.). The temptation to create prejudice against the witness by the introduction of such topics as his religious and political opinions, or his "patriotism" in a time of popular fervour for or against a war, when such are irrelevant as they generally are, ought to be sternly resisted, and anything tending to such impertinence ought to be vigilantly suppressed by the judge. And, indeed, that intervention is, as we have seen, one of the checks on our system of confutation; the other, and perhaps the more potent, is the certainty that any abuse of the right, causing unnecessary pain, by suggestion of degrading charges which cannot be sustained, or otherwise, will recoil on the trespassing party—if there is a jury, probably with a decisive force. And,

(on Ev. § 51) says that "the best modern example of forensic ability" of this sort is Hawkins's cross-examination of one Baigent in "the Tichborne trial of 1871." As bad cross-examination, Mr. Harris, Q.C., cites from the *Heart of Midlothian* Sharptitlaw's questioning Effie Deans and Jeanie's Madge Wildfire: *Hints on Advocacy*, Introductory (1897). "It is only a knowledge of human character that enables one to cross-examine," *ib.*

herein, in practice lies the great safeguard of cross-examination. At any rate, in fact, we avoid the absolute licence<sup>1</sup> which, it seems, is legally admissible in a French trial, owing to the absence of a distinct law of evidence.<sup>2</sup> The underlying theory there may be more logical, but it is certainly less practical. It is that the tribunal should know whatever facts exist—the more truth they have, the more they are likely to find. If there is anything anywhere in any one's life that he or she is ashamed of, that is his or her affair, for which justice cannot be stinted. Let wrongdoers beware—there is an extra chance that the wrong may come out; if appearances only are against them, let them have full opportunity of explanation. Such a train of reasoning would be sound, if any man were all mind, but tribunals composed of human beings have prejudices, traditions, emotions, and creeds which are irrational, and it is right that these should not be wantonly stirred. Perhaps the truth is that our limitations on the interrogations of witnesses are too many and the French too few. In both systems, probably, the humanness of the triers reacts against any gross misapplication of the process, in favour of the victim<sup>3</sup>; as a judge wittily put it, the art of cross-examination is not to examine “crossly.”

<sup>1</sup> i.e. of the judge, who alone may question witnesses; counsel do it through him.

<sup>2</sup> At the opening of the trial of Landru for murders “the president . . . very pointedly informed counsel [for the defence] that it was his duty to enlighten the jury about the antecedents of the accused—a duty which, he conceived, was in accordance with justice” (*Daily Telegraph*, Nov. 9, 1921). We conceive just the reverse,

<sup>3</sup> “I heard but hardly believe . . . that a juror had said he would never find against the Claimant because Bovill [the judge] and I [the cross-examiner] had been very hard on him. I doubt this, but it is awkward.”—Sir J. D. Coleridge (afterwards Lord Chief Justice), 2 *Life*, p. 417 (in *Journal*, June 16, 1871).

## 21. Re-Examination

The witness now reverts to his own side, and it is only fair that he should have an opportunity of putting in the most favourable light for the side which called him (or for himself) matters which are thought to have told against it or him. The object of re-examination is to set up what has been knocked down, and it is therefore confined to what tends thereto. No new subject may be introduced. Occasionally this examination is as effective as that to which it is the foil, as when the cross-examiner, acting on wrong or insufficient information, elicited that the witness had been in the company of a lady (in circumstances from which possibly a jury might draw unfavourable inferences), but carried the inquiry no further, the re-examiner simply asked who the lady was, and the answer being "my wife," the opponent's case was considerably damaged by what may have been an innocent mistake.

Witnesses are called in succession for the same side.

A French practice, that of confronting witnesses who give a different version of the same event, is occasionally seen in the County Courts,<sup>1</sup> when the issue being simple and the stake comparatively small, it is sometimes rapidly efficacious but naturally leads to undignified retorts and outbursts of temper.<sup>2</sup> It is of little use in a case where the least unravelling is necessary, though in rare circumstances, under

<sup>1</sup> Taylor mentions (and in an earlier edition laments) its disappearance from the High Court (sec. 1478). He mentions an Irish case in 1743, where the court ordered the confrontation of two witnesses who were examined alternately, and where at one moment four witnesses were in the box together (*Annesley v. Lord Anglesea*, 17 Howell's *State Trials*, 1351 and 1350).

<sup>2</sup> The Paris *Figaro* of August 24, 1904, contains an account of a "tumultueuse confrontation," which ultimately had to be stopped, owing to the extreme violence of one of the parties.

the spell of a dramatic moment which it might create, it might extort an admission or a confession.

## 22. "No Case"

The one side having produced its evidence, oral or documentary, has stated its grievance, and its case is closed. The court may now take the opportunity of deciding that there is nothing to go to the jury (if there be a jury), i.e. that there is absolutely no evidence<sup>1</sup> on which they can find for the view just presented to them; if there be any at all—"a *scintilla*,"<sup>2</sup> a judge once said—it must be left to them, at any rate, nominally. Or if the question emerging is purely one of law, and the court has a distinct opinion against the contention made, in both these events it officially declares that there is no case, without calling on the other side, in whose favour the cause thus ends.

## 23. The Defence

But judge or jury may, and commonly do, wish to hear the evidence and arguments for the other side. Accordingly, that side begins by a speech, the object of which is not only to pick holes in the case as now put forward by the opponents, but, if it is expedient to do more than expose his

<sup>1</sup> e.g. if the action be for the price of goods, and the vendor fails to prove delivery.

<sup>2</sup> Mr. Justice Erskine (in *Davidson v. Stanley*, 1841, 2 M. & G. 727): but now this is too little; unless there is enough on which "they *might* reasonably and properly" so find, the judge ought to withdraw it (*Metropolitan Railway Company v. Jackson*, 1877, 3 App. Cases, 207; *Dublin, etc., Railway Company v. Slattery*, 1878, *ibid.*, 1194, 1200; *Toal v. N.B. Railway*, 1908, A. C. 352; and see *Gee v. Metropolitan Railway Company*, 1873, L. R. 8 Q. B. 177). The ultimate criterion is—has there been "some substantial wrong or miscarriage?" Order 39. rule 6. of Supreme Court.

weakness, to carry the war into the enemy's camp by showing the strength of the facts itself will positively set up. The procedure is then exactly the same as that of the other side, already touched upon, till after evidence (if any) called, another speech is permitted to the side now "in" on the whole case, as now presented by both litigants. Finally, the beginning side is now allowed a second speech, to reply on the defence which has been made to its attack. "The last word" is, perhaps, a tactical advantage. It is necessarily given to that side, because, till the opponent is finished, it cannot know the fulness of his reply. And so, when no evidence of any kind is called for the defence, the beginner must make his second speech at the close of his own case (if at all). Here the defender relies entirely on the weakness of the case he has to meet, and, accordingly, it is to that case only its advocate need address himself.

## 24. The Summing-up or Direction to the Jury

The judge then sums up. His address, which is actually the last word before the jury deliberates, often (it is generally believed) turns the scale. Is it, then, fair that it should affect the result?

Theoretically, nothing could be more scientific than that the trained thinker, the champion of impartiality, who has a general control over the proceedings of the court, should, in an equally general way, guide and direct the counsels of one constituent of it. No one will suggest that he should compel them. In many cases a reasonable person who has heard the whole of the case can come to but one conclusion, and in those, whether the judge sums up or not, the jury would come to that conclusion. But in many others, the

proceedings leave a genuine doubt what actually took place on a given occasion or occasions. It is the special business of the jury to solve that doubt; it is not the function of the judge. Yet suppose he has no doubt, or, at any rate, has formed a strong impression on which side the truth lies, is he to sit by, and possibly to see injustice done (as he believes), for want of a word from him? And if he cannot be certain in his own mind that the jury will find the facts correctly, he must be still less certain that they will apply the law as he has explained it to them, correctly to the facts they do find, where their verdict must include determinations both of law and fact,<sup>1</sup> though in its form it is simply a declaration "for" one side or the other. And yet the mere existence of a doubt on their part shows that doubt is possible, and that for that very reason their especial function begins. The dilemma seems to be—if it is a clear case, free from doubt, the jury will agree with the judge and a summing-up is useless; if they disagree with him, it is clear they doubted where he did not, and therefore a summing-up invades their province.

The view of the law itself on this subject has not always been the same; the doctrine that a judge should sum up the whole case generally seems to be comparatively modern. In 1745 a great judge, Lord Chief Justice Willes, distinctly said, "In answer to the objection that" a certain plea "is leaving the law to the jury, it must be left to them in a

<sup>1</sup> e.g. according to the variations of a number of facts the law of "contributory negligence" (i.e. who of two contributories is liable for the result) varies extremely. Yet the jury may simply find for one side or the other; they need not declare that there was or was not contributory negligence or from what facts they draw their conclusion. A judge might think their inference from the facts right, and their application of the law wrong; or he might disagree with their view of the facts and yet admit that on that view they had applied the law correctly. (Cf. p. 66).

variety of instances where the issue is complicated, as 'burglariously,' 'feloniously,' 'treasonably.' 'Was it a devise or not?' 'Was it a demise or not?' But the judge presides at the trial for the very purpose of explaining the law to the jury, and *not to sum up the evidence to them.*"<sup>1</sup>

Compare that with another case in 1841. Mr. Justice Bosanquet<sup>2</sup> said, "Is a judge merely to read over his notes without saying in what manner the case strikes him?" To which counsel replied, "It is not the duty of a judge to state what is the balance of evidence." And the judgments show what the court thought in this matter. Chief Justice Tindal says, "The whole objection amounts to this, that the opinion of the judge was delivered in favour of the defendant. I think it is no objection that a judge lets the jury know the impression which the evidence has made on his own mind. At all events, the party objecting to such a course should show that the impression entertained by the judge was not justified by the evidence." "A judge," said Mr. Justice Bosanquet, "has a right to state what impression the evidence has produced on his mind." "The learned judge," says Mr. Justice Coltman, "seems to have made strong observations, but not stronger than he was justified in making. A large mass of evidence had been given, which, though of little weight in itself, was of such a nature as might mislead a jury"—a hint about one specific duty of a judge to a jury.

The danger, of course, is that a jury should become a mere instrument to register the decrees of the judge. And this danger arises from the position of the judge. His opinion would naturally and rightly prevail, endorsed after

<sup>1</sup> *Winsmore v. Greenbank*, Willes. 583.

<sup>2</sup> *Davidson v. Stanley*, 2 M. & G., 727.



discussion by the jurors, even if it only came before them like any other view presented to them, but it does not. It comes before them with peculiar force. However intelligent a man is, if he is not disciplined in the work, his mind must fluctuate hither and thither as he hears details and arguments (to say nothing of appeals to his sympathies), first on one side and then on the other. It is inevitable in such a state of doubt that he should repose in the one person who speaks with authority, whom he knows to be absolutely disinterested, and whom it has been (happily) his life-long habit to regard with respect, and perhaps a touch of awe, and that he should thus adopt his opinion bodily. And the stronger the judge's view, the more outspoken the bias,<sup>1</sup> the more will the irresolute jurymen be prone to take refuge in the judge's certainty. In such a case there is no trial by jury. Such considerations have been felt so strongly in

<sup>1</sup> Chief Justice Erle told the following story in 1851. "I was counsel in a case of assault. My client had had three ribs broken by a drunken bargeman. The opposite counsel cross-examined whether since the accident, he had not been a field preacher whether he had not actually preached from a tub. He admitted that he had. I did not see the drift of this; for, though a man could not easily preach after his ribs had been broken, he might when they had re-united. The judge summed up strongly against me, and my client got nothing. I afterwards found that the judge had an almost insane hatred of field preachers. It is true that each jurymen may have prejudices equally absurd. but they are neutralised by his fellows, and, above all they are not known" (1 Senior's *Conversations*, p. 315). In the Whitaker Wright case, "Mr. Justice Bigham, in his summing-up, did not hesitate to indicate the inferences which he would be disposed to draw from the evidence, while assuring the jury of their right to draw their own inferences. This mode of summing-up, though forbidden in some of the United States, is well established in England, and is recognised by the practice of asking a judge if he is satisfied with the verdict against which any appeal is made. While at times abused by judges of imperfect discretion, it has its advantages, especially in a long case, in assisting the jury to a conclusion, or making them more careful in examining the evidence, if they are inclined to differ from the inferences of the judge" (*Law Journal*, January 30, 1904).

France,<sup>1</sup> and in some of the United States, that the summing up has been abolished in criminal courts.

"En France," says the Comte de Franqueville (*Le Système Judiciaire de la Grande Bretagne*, c. 27. 7), "où le résumé des présidents d'assises n'était souvent qu'un nouveau réquisitoire [speech for the prosecution] à peine moins violent que celui du ministère public [the prosecutor], on a voulu couper le mal dans la racine et l'on est allé jusqu'à supprimer entièrement cette formalité: l'on est ainsi tombé de Charybde en Scylla et le remède est plus fâcheux peut-être que le mal lui-même." It must be remembered, this is said of criminal procedure. The next sentences are worth quoting, "En Angleterre les résumés [summings-up] sont d'admirables modèles d'impartialité, de raison et de bon sens; non pas que le juge se dispense toujours de laisser percer ou même d'indiquer formellement son avis, lorsque cela lui semble nécessaire; mais parce que son attitude, pendant les débats et le soin qu'il a toujours pris de tenir la balance égale entre l'accusation et la défense ne permettent pas de mettre en doute son impartialité absolue. Dans ce résumé même, on le voit toujours jaloux de signaler ce qui peut être favorable à la défense et d'indiquer les points faibles de l'accusation."

The principles here enunciated may be accepted as the ideal of any summing-up. M. de Franqueville mentions a case where a jury said they could not (and did not) agree because they did not know the judge's opinion.

It is, no doubt, idle to expect a man who has made up his mind, to be impartial—and that conviction should *sometimes* force itself on the judge's mind is inevitable—

<sup>1</sup> In France, since 1881 (Bodington, *The French Law of Evidence*, ch. viii.), the judge merely directs the jury on their duties, and puts to them the prescribed questions. There never was any summing-up in civil cases, as there are no juries (see p. 71 n.).

but at least he can be judicial. Here, perhaps, is a solution of the difficulty. The more convinced he is that one side is in the right the more he should attend to the contentions of the other side. The great influence of the judge is always there, so to say, not only dominating without effort, but gratefully invoked; it is an abuse of it, as is too often done, through eagerness to maintain one's own position, to ignore the pretensions of its opponents.<sup>1</sup> A jurymen will probably forget what the judge passes over. By all means let a judge show that he attributes more weight to the allegations or logic of one suitor than to those or that of the other; but at least he ought to deal with every point the side he does not favour puts forward, dismissing it, it may be, but reminding the jury on every suggestion of fact—*usque ad nauseam* possibly—that in a real sense that issue is for them to decide, and not for him. In short, let him balance,<sup>2</sup> with nothing left out of either scale; the final reckoning of the individual weights in each is not for him. The French writer just cited rightly conceives the proper state of things, "Le juge résume les débats en appréciant la valeur des témoignages produits et en donnant la solution

<sup>1</sup> Mr. Taylor mentions another objection: "this mode of proceeding may arouse the jealous feelings of a jury, and excite them, in their anxiety to prove their independence, to pronounce an unjust verdict" (*Evidence*, sec. 25).

<sup>2</sup> "I know," once said Lord O'Hagan, in the House of Lords, "that some judges have thought it right to balance the evidence on questions which juries have to consider, on the one side and on the other, and to leave the jurors, who are constitutionally the judges of fact, to draw their own conclusions; but I am aware also that other judges . . . think it to be their duty to direct the juries as well as they can upon questions of fact as upon questions of law; not to coerce them, but to give expression to their own opinions in clear words, and if those expressions of their opinions in clear words do lead the jury to conclusions in accordance with the conclusions of the learned judge, the judge is the better pleased with that, and very often the jurymen are none the worse for it" (*Prudential Assurance Company v. Edmonds*, 1877, 2 A. C. 500).

des questions de droit de façon à bien préciser les points sur lesquels le jury doit répondre." (*Le Système Judiciaire de la Grande Bretagne*, c. 19. 7, he is here speaking of civil procedure).

The characteristic value of the summing-up, to which, indeed, it owes its existence in its modern form, and which makes it absolutely necessary at hearings of any length, is the exposition in orderly sequence by a master mind of the involved relations between the different actors, the pursuit of the many threads of their activities, and the co-ordination of the whole mass of deeds and words to one picture or a series of pictures. It is thus a counterpart of the opening speeches, and should be, and sometimes is, a work of art.

The functions of the judge generally are *historically* considered in the following passage (Pollock and Maitland's *History of English Law*, vol. ii., bk. 2, ch. ix., sec. 4, p. 667): "The behaviour which is expected of a judge in different systems of law seems to fluctuate between two poles. At one of these the model is the conduct of the man of science who is making researches, and will use all appropriate methods for the solution of problems and the discovery of truth. At the other stands the umpire of our English games, who is there, not in order that he may invent tests for the powers of the two sides, but merely to see that the rules of the game are observed.<sup>1</sup> It is towards the second of these ideals that our English mediæval procedure is strongly inclined; we are often reminded of the cricket match. The judges sit in court, not in order that they may discover the truth, but in order that they may answer the question, 'How's that?' This passive habit seems to grow upon them as time goes on, and the rules of pleading are

<sup>1</sup> "The sporting theory of criminal justice."—Fitzjames Stephen, 1 *Jurid. Soc. Papers*, 468 (1857).

developed." Since the decay of these latter, the judicial mind, it is hoped, is monopolized by the first ideal. The mediæval view has not survived (see p. 49).

The origin and object of this address are expressed in the word "summing-up." Its place is the same in civil and criminal cases, and as of late years<sup>1</sup> it has been much considered in the latter, more about it will be found under that head.

## 25. The Verdict

The jurors must be unanimous, unless (in civil cases *only*) the parties agree to accept the finding of a majority, when it has been announced that they cannot agree, or possibly by reason of the absence of one of them.

As has been already mentioned, the jury may have the duty to return a verdict simply for one litigant or the other, and to assess damages (if any), and they have the *right* to do no more. This undoubted right<sup>2</sup> of saying simply "for A." or "for B." is sometimes valuable, and has occasionally (in criminal, though but very seldom in civil cases) caused friction between the judge and the jury.

<sup>1</sup>The late Lord Justice Sir Edward Fry was the first Chancery judge "to go circuit": Chancery judges no longer go, but his view, as a novice, so to say, in addressing juries, is very valuable: "The summing up of a case to a jury is a mental exercise alien to, and yet essentially different from, that of delivering a judgment and I have always rather enjoyed it. I have never followed the practice adopted by some judges of going into the evidence over again at length; rather I have always striven to call the attention of the jury to the several points in controversy, and the general nature of the evidence upon each of these points. Some judges almost tell a jury how they ought to find, and so seem to me to assume a function which is not theirs according to our constitution. I have always striven to avoid doing this, and to leave the question really as well as formally to the jury, taking, however, great care that they should never find a man guilty whom I believed to be innocent."—*Memoir*, p. 69 (1921).

<sup>2</sup> *Mayor of Devizes v. Clark*, 3 Ad. & E. 506, in 1835.

For the judge may think it convenient to put certain questions to them about the facts, upon their answers to which the law will depend, and this he will apply. Such a course often defeats the intention of the jury, for they may conscientiously be able to answer the questions in only one way, and thereby may supply reasons for a decision, the contrary of which they could and would have secured without stating any reasons. The whole situation is well illustrated by what happened in the famous Transvaal Raid Case in 1896.<sup>1</sup> The Lord Chief Justice said towards the end of his summing-up, "Finally, I have to ask you to answer certain questions. . . . I am now about to direct the jury as on former occasions, and to tell them that if they desire they may decline to answer the questions. . . . I was about to tell you that my brethren and I put these questions to you for two reasons. The principal reason is that they are necessary in order to show the dividing line between what are questions of fact and what are questions of law, because we think that this is peculiarly a case upon which it would be almost grotesque to ask you, without any guidance from the court, to pronounce an opinion about what was the effect of documents and so forth. . . . We were also about to tell you that, if you choose, in opposition to the request which I and my brethren make to you, to refuse to answer these questions, nobody can make you answer them. The court asks you to answer them because they think it is right in the interests of justice and in the interests of the vindication of the law that they should be answered. . . ."

The Foreman of the Jury: "I am sorry to ask the question, my lord; but suppose we prefer not to answer them in this way, is the alternative 'guilty' or 'not guilty'?"

<sup>1</sup> A criminal case, but the law is the same for the present purpose.

The Lord Chief Justice: "That would be the alternative undoubtedly. But you ought to consider it without any feeling at all, and with the desire to see the law carried out reverently and decently. You will be incurring some responsibility if, without adequate reason, you refuse to answer these questions."

The jury answered each question, whereupon the Lord Chief Justice said: . . . "That amounts, gentlemen, to a verdict of guilty. Do you now find against all the defendants a verdict of guilty?"

The Foreman of the Jury: . . . "My lord, we have answered your questions categorically."

The Lord Chief Justice: "Then I direct you that in accordance with those answers you ought to find a verdict of guilty against the defendants. . . . Gentlemen, I direct you that in point of law that amounts to a verdict of guilty, and it is your duty to say so."

The Foreman: "My lord, there is one objecting to that. We answered your questions categorically as an alternative; we cannot agree upon a verdict."

The Lord Chief Justice: "That is a most unhappy state of things. If there is one jurymen objecting to a verdict, he ought to reconsider the matter. These questions, answered as they are, amount to a verdict of guilty, and to nothing else. They are capable of no other construction, and therefore I direct you—and I direct my observations particularly to the gentleman to whom you refer as disagreeing with the rest on the verdict—that you ought all to find, in accordance with those findings, a verdict of guilty."

After some further consultation, the Foreman again rose, and said: "My lord, we are unanimous in returning a verdict of guilty."

. . . . .

The Lord Chief Justice (in passing sentence) said: "The jury have arrived at their verdict upon evidence which, I think, no reasonable man honestly applying his mind, could doubt—can doubt—not only justifies, but rendered" it "imperative if they were to discharge their duty honestly and fearlessly" (Official Report and the *Times*, July 29, 1896).

Here it is obvious that one at least of the jurymen wished to declare "not guilty," and if they had all done so, the court would confessedly have been powerless. Thus this case shows the value of the special verdict, i.e. the findings of certain facts, for, in effect, it compels the jury, so to say, to show their hand and leave the final adjudication in the hands of the court, which will put the proper legal interpretation on those facts. For it has long been observed as the chief flaw in the system of trial by jury, that juries have the power, though not the right, to find the law (p. 70)—a power which can be defeated by the device of inducing them to answer specific queries, for it is much more difficult for bodies of men or for individuals to answer plain questions perversely than to stretch an opinion, especially one not strongly entertained one way or the other—and, after all, finding for one litigant or the other is expressing an opinion. For instance, in the case last mentioned, the jury, if left to themselves, probably would have found a verdict of "not guilty"; confronted with definite questions, they could not have achieved that end without an obviously perverse distortion of the facts. To such perverse findings we shall see the counter-stroke of the law presently. Further, a jury often does not know the legal effect of a special verdict or it would not give it. Might it, therefore, not be suggested that, in the interest of legal justice, the true type of a verdict in civil cases is the special verdict?



## 26. Disagreement of Jury *inter se*

If the jury fail to agree, the judge usually makes one or two attempts to get unanimity; if he fails, he must perforce release them from further consideration of the case.<sup>1</sup> Things are then as they were before the trial, and the suer still has, generally, the right to begin again.

## 27. Disagreement of Judge with Jury

Even when the jury agree upon a verdict it may have no effect, even for a moment, for it still has to run the gauntlet of the judge, who may, and occasionally does, disapprove of it and set it aside. In 1862 Chief Baron Pollock said "a judge has a right, and in some cases it is his bounden duty, whether in a civil or a criminal case, to tell the jury to reconsider their verdict. He is not bound to receive their verdict, *unless they insist upon his doing so*; and where they reconsider their verdict and alter it, the second, and not the first, is really the verdict of the jury."<sup>2</sup> In a civil case there is no necessity for a judge to ask a jury to reconsider a verdict of which he disapproves, for it is expressly provided (by the Rules of the Supreme Court, Order 36, Rule 39) that he shall direct judgment to be entered "as he shall think right." Accordingly, to take a concrete instance, where the question for the (special) jury was whether a husband had an English or an Austrian domicile at a given

<sup>1</sup> "It has been often suggested that after a certain time the verdict of a majority [*misprinted* minority] should be taken as, for instance, that the verdict of eleven should be taken after one hour, and that of nine after three hours. Such proposals appear to me to be open to the objection that they diminish the security provided by trial by jury in direct proportion to the occasion which exists for requiring it."—Sir J. F. Stephen (a judge), 1 *Hist. Crim. Law*, 305, c. 9. See further on *Unanimity*, p. 285 and 2 Pollock and Maitland B. 2, c. 9, s. 4.

<sup>2</sup> *R. v. Meany*, L. & C. 213; 9 Cox 231—a criminal case; the words in italics only refer to criminal cases (see p. 300).

moment (on which depended the question whether a divorce granted in Austria was valid or not), and though the judge directed them that the facts were really all one way, i.e. showed that the man's domicile was Austrian, they found (apparently from sympathy with the guiltless wife) that it was English, and persisted in that finding, the judge ordered judgment to be entered for the husband, who asserted the Austrian domicile.<sup>1</sup> After expressing his extreme astonishment at the verdict ("I was never more astonished in my life, and I thought that a jury might be fairly trusted . . . I have heard some astounding verdicts in my life, but I confess I was never before so taken by surprise") his lordship went on, "I never wish to appear to set aside a verdict of a jury, and I say it with the greatest regret, . . . but had I known what course things were going to take, I should have considered one, two, or three times before deciding that it should be left to a jury. The *onus* does lie on the wife to show a change of domicile, and no real evidence has been offered on this point on which a jury of reasonable men could find that there had been a change of domicile, and I am prepared to direct judgment to be entered for the husband. I do desire to add that I have no hesitation in saying that the Austrian decree is valid, and that this English marriage has been dissolved."

If it is just that a judge should have this power<sup>2</sup> where the jurors are unanimous, *a fortiori* is it right where they disagree, for then some of them agree with him. Accordingly, it occasionally happens that when the jury disagrees, the judge decides for one party.<sup>3</sup>

<sup>1</sup> *Lowenfeld v. Lowenfeld*, the *Times*, July 15, 1903.

<sup>2</sup> A County Court judge apparently has it not.

<sup>3</sup> e.g. *Peters v. Perry*, 10 T. L. R. 366, 1894, in a case where both the motives mentioned in the next paragraph seem to have weighed with the judge

But cases of judges thus formally overriding or superseding juries are naturally rare. They may all, perhaps, be classed as cases in which the judge might, had he chosen, have stopped the trial when the one side had finished, on the ground that there was no evidence "to go to the jury" against the other (p. 97), and he does not lose this right because, contrary to his expectation, the verdict is for the former. He may think that by not withdrawing the case from the jury, he may give the suer another chance, for the witnesses for the sued may strengthen the case of the suer—a thing that often happens—or that in the event of an appeal it may be convenient and save time and expense that the evidence of both sides should be before the court. In criminal cases he may, if he is dissatisfied with the verdict, at once give leave to appeal.

In any case, exceptions of this sort do not practically impair the fundamental rule that where there is a doubt about the facts, it is for a jury to decide upon them. Moreover, such judges' verdicts are like their other decisions, and like all verdicts, subject to appeal. Still, this ultimate control of a judge of first instance gives great colour to Bentham's view: "A conception nearer to the truth will be formed by considering the main or principal power as in the hands of the judge, that of the jury serving as a check to his power, than by considering the principal power in the hands of the jury, that of the judge serving as a check to theirs."<sup>1</sup>

## 28. Judgment: Execution

In the great bulk of cases the judge gives effect to the verdict of the jury, and if they award damages, pronounces

<sup>1</sup> *Works*, vol. v. p. 67; *Juries*, Part I., ch. ii.

for the amount they find. Of course, if there is no jury, he has the powers of one. Unless he otherwise orders, his judgment takes effect at once, and if it includes, as it commonly does, a direction that one party is to pay the other a sum of money, that sum becomes a debt, and the creditor has all the ordinary rights of a creditor in respect of it (e.g. he can sell it, or take bankruptcy proceedings in respect of it), *plus* the right to "issue execution," i.e. to have the debtor's property—in whatever form almost it may be found—seized and sold to defray the debt, on going through the simple formalities necessary; execution may take place on the very day of the judgment. It is this stage which a litigant should keep in view "before taking action, for, if the party he sues is not worth powder and shot," i.e. has no property or not enough, a victory may be barren, or nearly so, for there is nothing or extremely little on which to levy execution, and the creditor may be saddled with the cost of issuing it, besides his previous expenses. However, there is a process by which the debtor may be examined—publicly, sometimes—about his means and independent evidence thereof given; and if the judge thinks that he is wilfully refusing to satisfy the judgment, or has had means to do so, and yet has set it at defiance, he may send him to prison for six weeks or less (p. 238).

If the judgment should be that a specific thing is to be delivered over it could be enforced in much the same way. Moreover, the judge can commit to prison for disobedience to his order; and this is generally the remedy of the court where it has adjudged something to be done (e.g. an obstruction to be removed) or not to be done (e.g. certain persons not to trespass on land)—in contradistinction to something to be paid—and it has been disobeyed. It follows that where an appeal is contemplated by the sued,

frequently their first object is to get a stay of execution from the judge pending appeal, for in any case, it may be extremely inconvenient to pay over a sum of money—to take the commonest instance—for a time, even though it is ultimately returned on the success of the appeal, and in many cases, the party to whom the money is due, would certainly not be able to refund it in the event of the appeal going against him. On the other hand, it is not fair that the winner should be deprived for an indefinite time of the enjoyment of money which the appeal may finally show ought to have been his from the date of the judgment, or before; accordingly, the law provides that he is entitled to four per cent. interest on the sum awarded all the time he is “kept out” of it. Further, his opponent, too, may be of such sort that unless the judgment can be satisfied at once, it may never be satisfied, for he may dispose of his property, or otherwise lose it, before the appeal is decided. In all these circumstances the judge must make up his mind. Where the losing party is thoroughly substantial and certain to be “good” for the money at any future time, he will more readily grant a stay of execution without any conditions; if he is not so confident of the future solvency of the loser, he may order the money to be paid into court as a condition of granting a stay, there to abide the appeal, and he may take exactly the same course if he wishes the money not to get into the hands of a winner who probably would not refund it, if the appeal was successful. Or he may disapprove so entirely of the proposed appeal that he may refuse to help the appellant in any way, in which case execution may issue at once, unless a higher court can be persuaded to grant a stay. And there may be an appeal against any of the other decisions for a stay just suggested.

## 29. Costs

The judge has a further duty to perform at the time of judgment. A judge once remarked jocularly that there were matters of three degrees of importance in every action: first, there were the legal technicalities; second, the costs; and finally, the merits (*Attorney-General v. Earl of Lonsdale*, 23 L.T.N.S. 794-5, in 1870). In any case, the subject of costs is of sufficient importance to be treated separately (p. 141).

## 30. Appeals

The broad principle on which it is permitted to challenge the conclusion of a court is, of course, that it is fallible, it may have made a mistake in finding facts, i.e. it asserts or assumes something to have happened which, in fact, did not happen, or in administering the law, i.e. in the opinion of other lawyers, it applies the wrong law, or no law, to the facts before it (or, of course, it may combine both sorts of error). On the other hand, it is obvious that resort cannot be had to this principle indefinitely, else litigation might go on for a very long time, indeed, it might never definitely and formally cease. Clearly, in a *bona fide* dispute, injustice is done to some one by unnecessary delay in finally settling it (to the State, says an old maxim, by reason of its citizens who are at law not minding their own business, so to say), and very gross injustice by very long delays. The law, therefore, has to take up a position intermediate between these two possibilities of grievance. It will review a decision alleged to be unjust, but it will not review such review *ad infinitum*. Roughly speaking, it thinks two "shots" enough, but sometimes it will not permit even one. For the present, nothing is said of criminal procedure.

As usual, we cannot go into the history of the subject, but may cite the following sentences: "Nothing that was or could properly be called on appeal from court to court was known to our common law. This was so until the "fusion" of common law with equity in the year 1875. . . . In the twelfth century, under the influence of the canon law, Englishmen became familiar with appeals (*appellationes*) of a quite other kind. . . . The graduated hierarchy of ecclesiastical courts became an attractive model. The king's court profited by this new idea; the king's court ought to stand to the local courts in somewhat the same relation as that in which the Roman *curia* stands to the courts of the bishops. It is long indeed before this new idea bears all its fruit, long before there is, in England, any appeal from court to court" (Pollock and Maitland, *History of English Law*, vol. ii., bk. 2, ch. ix., sec. 4).

Now, at any rate, there has been a great growth of the idea, though the curtailment of its luxuriance has been a constant achievement of modern reforms. As the science of law has grown, naturally a point of law has become more important to the lawyer; hence professional bias has favoured such appeals to those on the facts. Roughly speaking, the upward steps of the hierarchy now are from the plane of County Court, or of police court or petty sessions, or other local courts, or of chief clerks, masters,<sup>1</sup> registrars, referees, arbitrators, commissioners (railway, income tax, etc.); or from a single judge of the High Court; or from the King's Bench Division or the Probate, Admiralty and Divorce Division—on the same plane; the Courts of Appeal; the

<sup>1</sup> Officials largely concerned with the administrative details or "the practice" of an action, both before (as illustrated frequently above, p. 52) and after. Out of London, many of their duties are performed by district registrars.

House of Lords<sup>1</sup> (i.e. the peers who are or have been judges<sup>2</sup>). The word "roughly" is used because no appellant needs to go through the whole gamut of tribunals, but must pick his halting-places according to his point of departure. The combinations are many, and even practitioners are sometimes in doubt whither their first step must be, but the Divisions, the Court of Appeal, and the House of Lords, are practically occupied entirely with appeals. With a few exceptions, there is no application in the Court of Appeal which may not be carried to the House of Lords. With the exception of the two extremes, there is no court which may not be appealed to as well as from, and it will be generally noticed that by a sort of courtesy, appeal is generally to a larger number of judges than it is from. No co-ordinate court, i.e. one on the same plane, can bind or control any other. The (civil) Court of Appeal will always, if it can do so with justice, avoid ordering a new trial by disposing finally of the matter before it, with a view to saving time, trouble, and expense. Where the question is purely one of

<sup>1</sup> The Judicial Committee of the Privy Council is the body which hears appeals to the "King in Council," i.e. almost, but not quite, entirely appeals from our colonies, dependencies, India, etc. (see p. 118). The Chancery Judges sit singly and without juries. Quarter sessions, which might be included in this list, are dealt with more conveniently (pp. 275 and 298).

<sup>2</sup> i.e. the Lord Chancellor, the Lords of Appeal in Ordinary (six at most; they are peers for life, and paid), and peers who hold, or have held, "high judicial offices." Theoretically, these appeals are heard at a sitting of the House, and any noble (though not "learned") lord may take part. It is stated (*Annual Practice*, 1921, vol. ii., p. 2132) that a lay peer took part in *Bradlaugh v. Clarke* in 1883, and voted with the minority. But in modern times, such a thing is otherwise unheard of. The House can always and sometimes does in cases of difficulty (as e.g. in *Daniel O'Connell's* case in 1844) consult the judges. This practice has survived from very early days when they, like other eminent officials, were members of a great conclave, of which the House of Lords is the largest surviving fragment. The judges still get a writ to "advise" each Parliament. For a *criminal* trial by the House of Lords, see p. 268 n.<sup>2</sup>.



law, it can always do so by giving judgment for the party it thinks is in the right; but where the decision of a jury is impugned, or there is a conflict of evidence, it is naturally reluctant to forgo the aid of findings of fact, and only interferes in a very clear case.

A County Court judge has more power in the matter of appeals than a High Court judge, for the latter cannot grant or refuse a new trial in a case he has tried, while the former can, and that whether he tried the case alone or with a jury. The reason is that the County Court takes cognisance of litigation about smaller sums<sup>1</sup> than the High Court, and is consequently the tribunal to which the poorest class of suitors generally have need to resort, and it is therefore desirable that the expense and trouble of appeal should be as small as possible—an end which is promoted by the application being made to the individual who already knows all about the case. From his decision about a new

<sup>1</sup> Roughly speaking, the County Court limit is £100 debt or damage. But this does not apply to actions remitted, *with* or *without* consent of the parties, from the High Court. But there is no jurisdiction, as a rule, in the County Court to try actions for breach of promise of marriage, libel, slander, seduction, or those "in which the title to any toll, fair market, or franchise" (including a patent) is disputed. Where there is a yearly rent or value in dispute it must not be over £100 if the County Court is to have jurisdiction. In certain cases there is power to remove a cause from the County to the High Court, security being taken that the party so increasing the costs shall, if necessary, pay them.

Speaking broadly, the County Court is a miniature King's Bench, and as, since 1865, it has had "a limited jurisdiction in equity," it might almost be called a miniature High Court, especially as, since 1868, there is a limited Admiralty jurisdiction in such of these courts as are held in the neighbourhood of the sea, and, since 1869, it has had outside London the jurisdiction in bankruptcy. Moreover, it has many other miscellaneous duties. An Act of 1919 still further widens the jurisdiction of this Court. (For Equity, see p. 224). It can only be mentioned here that the value generally of the property in litigation over which the County Court has equity jurisdiction is £500 or under. Solicitors appear in these Courts. No reference is here made to emergency (war) jurisdiction.

trial there is an appeal to the King's Bench Division only on points of law: on a question of fact he is final; e.g. that A. paid B. £10. But if he thinks a jury have made a mistake, e.g. have given excessive damages, or their verdict is against the weight of evidence, he can grant a new trial. And, speaking generally, he has a larger control over an action in his court than a High Court judge over one in his.

An appeal from the latter sitting alone is a re-hearing of the whole cause—law and facts—by the Court of Appeal. In some cases leave to appeal must be obtained from judges, for example, in the County Court when the amount at stake is £20 or less, and sometimes leave has to be obtained from the Court of Appeal to go to the House of Lords. The object of these restrictions is to discourage unnecessary appeals.

All these instances presume appeals by parties interested, but very often those parties are not sufficiently interested or wealthy "to go further"; in such cases the science of law may suffer. "The public, it may be suggested," says Dicey (see p. 37 n.<sup>1</sup>), "would gain a good deal if a power were conferred upon the House of Lords of calling up for the House's decision (say on the motion of the Attorney-General and of course at the public expense), cases determined by the Court of Appeal and involving the determination of an important principle of law which had never come before the House of Lords." This has actually been effected from the *criminal* Court of Appeal (but at the instance of a party). The only *non-litigious* faculty of this sort is under the Judicial Committee (of the Privy Council) Act, 1833, whereby the Crown may consult them in the abstract, so to say: this was done in 1913, when there was a doubt whether a member of the Commons had vacated his seat or not: *in re Samuel*, 1913 A. C. 514: they decided that he had.

# 31. Grounds of Appeal—Fraud, Perjury, etc.

Where there has been actual fraud, through which a judgment has been obtained, or that result has been brought about by untrue statements, which were not discovered to be false until it was too late, there practically is an appeal by means of a fresh action. Thus, in 1896, Littlejohn brought an action against Sturrock for moneys paid on his behalf. The former made out his case on affidavit so strongly, the essence of it being that he had paid the money for Sturrock to a third person (to whom Sturrock owed it, and of whom, apparently, he was not able to make any inquiry), that the latter believed him, and (under the summary procedure described, p. 51) agreed to pay the sum claimed without further proceedings. When he discovered that the whole story was a fraud, Sturrock successfully brought an action to recover all he had been made wrongfully to pay, including Littlejohn's and his own costs in that suit, and his costs in the second, or "review" action.<sup>1</sup>

It must be remembered that all appeals of this kind are to lawyers—never to juries. This is natural when pure points of law are to be discussed, and when a jury's findings of facts or of damages are impugned: two or three trained judges are quite competent to decide whether a verdict was *manifestly* perverse in any particular, for otherwise it will not be set aside. Moreover, witnesses are not heard after the trial of an action—their proper place—and very seldom in the preliminary stage before it, where affidavits are the only evidence. For the proceedings at the trial of an action—to which we confine ourselves—the court of appeal must rely on the judge's notes—except in the Probate,

<sup>1</sup> *Sturrock v. Littlejohn*, 68 L. J. Q. B. 165.

Admiralty, and Divorce Division, where there is an official shorthand writer—unless the parties have agreed to use and pay for a shorthand transcript.<sup>1</sup> In a sense, counsel who has appeared “below” is a witness, but an advocate is not a desirable witness. The court of appeal ought to have a full and faithful account of the matters on which it is to pass judgment, and should not need to resort to any extraneous inquiry.

## 32. Verdicts Appealed Against

The commonest grounds of appeal are that the verdict of a jury is against the weight of the evidence, that the damages a jury has given are too much or too little, that the judge has made a mistake in the law—for example, has admitted or rejected evidence wrongly, or has misled the jury—that the jury have been influenced by improper motives or means, that fresh and material evidence has come to light since the trial, or that there was perjury thereat, that the judge found the facts wrongly, etc., etc., all on the allegation that some substantial injustice has been done; a mere technical irregularity (cf. p. 97 n.<sup>2</sup>), not alleged to impede the course of justice, is not enough to upset a judgment.

And first, for appeals from verdicts of (civil) juries.

Since 1886, the principle of control has been clearly stated by the House of Lords.<sup>2</sup> A passenger was hurt, when

<sup>1</sup> It would, perhaps, generally add to the dignity of the appeal, and sometimes to the chances of justice, if there was an official shorthand record of every action, at any rate, in the High Court (as there is now of every trial on indictment). The judge's notes are like his summing-up (p. 98), necessarily coloured by his view; he need only put down the bare minimum of what he considers relevant, and that limitation may be the very ground of appeal.

<sup>2</sup> *Metropolitan Railway Company v. Wright*, 11 App. C., 152.

getting out of a carriage, by being thrown on to a platform by the motion of a train; she brought an action against the railway company, alleging negligence; they said it was her own fault. The evidence was conflicting, but a special jury gave her three hundred pounds. On appeal, the K.B.D. (i.e. two judges)<sup>1</sup> took the view that the verdict was against the weight of evidence, and ordered a new trial. The Court of Appeal restored the verdict, Lord Chancellor Selborne saying, "As the verdict was not perverse or unreasonable, looking to the evidence given, it does not seem to us to be a case in which the decision of the jury, who are the proper judges of such questions, should be interfered with. The damages are, I think, plainly not excessive, if the verdict is right or if the verdict was one which the jury, in the exercise of their proper judgment, were entitled to give. . . . I have always understood that it is not enough that the judge, who tried the case, might have come to a different conclusion on the evidence than the jury, or that the judges in the court where the new trial is moved for, might have come to a different conclusion, but there must be such a preponderance of evidence as to make it unreasonable and almost perverse that the jury, when instructed properly by the judge, should return such a verdict." "The question which we have to determine," said Lord Chancellor Herschell in the appeal to the House of Lords, "is not what verdict we should have found, but whether the Court of Appeal were wrong in holding, as they have done, that the verdict was not against the weight of evidence. The case was one, unquestionably, within the province of a jury, and, in my opinion, the verdict ought not to be disturbed unless it was one which a jury, viewing

<sup>1</sup> Under procedure now abolished—now the King's Bench Division is skipped.

the whole of the evidence reasonably, could not properly find. . . . I am not prepared to say that a jury might not reasonably find that the accident was due to the negligence of the defendants' servants." Lord Fitzgerald concurred, and said, "The judgment of Lord Selborne imports that a verdict once found is not to be set aside unless it appears to be a verdict perverse or almost perverse. If my recollection does not mislead me, we have departed, in this House in several instances, from the old rule which introduced the element of "perversity," and have substituted for it that the verdict should not be disturbed, unless it appears to be not only unsatisfactory, but unreasonable and unjust."

"What I take," said Lord Halsbury, "to be of supreme importance, as defining the functions of judges and juries, is the principle upon which a new trial can be granted upon the ground that the verdict is against the weight of the evidence . . . If a court can grant a new trial whenever it thinks that reasonable men ought to have found another verdict, it seems to me that they must form and act upon their own view of what the evidence in their judgment proves. That, I think, is not the law. If reasonable men *might* find (not 'ought to,' as was said in " another case) "the verdict which has been found, I think no court has jurisdiction to disturb a decision of fact which the law has confided to juries, not to judges." The verdict was unanimously upheld.

But this does not mean that, "if there is evidence to go to the jury, it is almost impossible, except in extreme cases, to set aside a verdict as being against the weight of the evidence." In 1896 a horse-dealer bought from a farmer for £70 a horse, with a warranty that it was sound and a good worker. Upon its arrival it was found that this warranty was not fulfilled. Several veterinary surgeons

said it was a very bad "shiverer," and suffering from a disease which must have been in existence at the time of the sale. This the seller vehemently denied. A jury awarded the buyer his money back, and two out of the three members of the Court of Appeal<sup>1</sup> upheld this verdict, being well aware of the case last cited, but not thinking that the jury had taken an unreasonable view. But the third member of the court did think so, saying, "Can a verdict which, ignoring a large body of evidence given by witnesses of unimpeached veracity, with every opportunity of knowing the true state of facts about which they speak, and some of them absolutely independent witnesses, facts, too, about which they could not be by any possibility mistaken, and which verdict adopts the mere speculative opinions of scientific witnesses unsupported by, and in opposition to, every antecedent fact proved in the case, and in the face of scientific evidence on the other side reconciling the evidence given on both sides, and affording a reasonable solution of the matter in controversy, be said to be just or reasonable? I answer that question in the negative. . . . If there ever was a verdict against the weight of evidence, I think this is one." And so thought the House of Lords,<sup>2</sup> which ordered a new trial. Lord Herschell quite approved of the general rule that juries should determine finally disputed facts; but thought that it is a "condition of any such rule, that the question which had to be determined should have been so left to them, that one is satisfied that it was before their minds, that their minds were applied to it, and that they did really on the determination of that question give their verdict." Lord Morris said, "The use of the word 'weight' implies that

<sup>1</sup> *Spencer v. Jones*, 13 T. L. R. 174.

<sup>2</sup> 14 T. L. R. 41; 77 L. T. 536.

there is evidence on both sides, but that it preponderates to such an extreme degree on the one side that it would be unreasonable for the jury not to act upon it, although there may be some slight weight in the other scale."

It comes then to this, that the verdict of any High Court jury may be annulled by three (or two out of three) judges in the Court of Appeal or five or six (or a majority of them) in the House of Lords, and this on a review of exactly the same evidence *minus* the living witnesses.<sup>1</sup> It must be remembered, however, that the appeal from the larger to these smaller juries is from the untrained to the highly trained in gauging and analysing evidence. The (comparative) fewness of the verdicts thus set aside is a tribute to the common sense and application of the jurors. We have seen (p. 109) the course open to a judge dissatisfied with a verdict. No official notice—at any rate systematically<sup>2</sup>—is taken of his satisfaction or dissatisfaction; the mere fact that the jury would not adopt the judge's view of the evidence,<sup>3</sup> will not weigh with the reviewing court.

### 33. Damages

The policy in respect of the award of damages is much the same. The general rule is that the amount is a matter

<sup>1</sup> This element has been increasingly insisted on of late years, especially in the criminal Court of Appeal.

<sup>2</sup> In Ireland, apparently, a judge who is dissatisfied with a verdict formally certifies the Court of Appeal to that effect (*Quinlane v. Murnane*, 18 C. L. R. Ir. 53: 1885, where a jury gave sixpence for a bad assault in "a public-house row." On a second trial, substantial damages were given). Cf. *Preston v. Heffer* in Court of Appeal, *Times*, June 28, 1905; and cf. *Law Journal*, January 27, 1906, p. 48. The Court of Criminal Appeal has the statutory right of calling for a report from the trial judge.

<sup>3</sup> *Seaton v. Sheridan*, 12 T. L. R. 285, in 1896, see pp. 121-2.



peculiarly within the province of the jury, so much so that, except by consent, a judge never fixes the figure unless it is fixed by law; but if it can be shown that the sum is either so little or so much that there must presumably be something wrong in the way it was arrived at, a court will interfere and either rectify the figure or send the case to be tried by another jury.

First, a few words on damages generally. In 1877 a London doctor, earning, it was said, between £6000 and £7000 a year, was injured and incapacitated for life by a railway accident. He brought an action, and the judge, in addressing the jury, thus laid down the law<sup>1</sup>: "As a matter of law, the principle of damages is not very well defined, and I am inclined to think purposely so, because in this country, be it right or wrong, the public are to be judged by their fellow public, and not always to have the minds of lawyers to judge between two men of ordinary life and habits. In a question of damages like this, it seems to me that the law means to bring in the habits, thoughts, feelings, and general knowledge of things, which are brought to bear, by taking twelve honest, independent men, chosen indifferently, and putting them into the box to consider what sum one man ought to pay another for an injury. With regard to contracts there is no difficulty. If I contract with you to sell you so much sugar at such a price, and I do not do it, and you are obliged to spend double the money in getting the sugar, you put down the figures and say the damage you have sustained is so much, and that is what I must pay. If I contract with you on a bill of exchange, I must pay the amount and the interest upon it, because I have contracted to pay that. In those cases there is no difficulty whatever

<sup>1</sup> *Phillips v. London and South-Western Railway Company*, 5 Q. B. D. 78.

in the principle of damages. But when you come to damages like the present, which involve personal injury, the measure becomes more difficult. The only principle, if I may use the word, which applies to contracts is this, that you must, as a rule, give a man compensation by way of damage for the loss he has, in the ordinary and natural course of things, suffered from the breach of contract. But it has been pointed out for centuries, and it is the principle of foreign jurisprudence as well as ours, that in actions for personal injuries of this kind, as well as in many others, it is wrong to attempt to give an equivalent for the injury sustained. I do not mean to say that you must not do it, because you are the masters, and are to decide; but I mean that it would operate unjustly. . . . Perfect compensation is hardly possible, and would be unjust. You cannot put the injured man back again into his original position. . . . You will have to consider under the head of damages, first of all, the pain and suffering to him. An active, energetic, healthy man is not to be struck down almost in the prime of life, and reduced to a powerless helplessness, with every enjoyment of life destroyed, and with the prospect of a speedy death, without the jury being entitled to take that into account, not excessively, not immoderately, not vindictively, but with the view of giving him a fair compensation for the pain, inconvenience, and loss of employment which he has sustained. . . . The next head which you have to consider is the amount of expense which he actually incurred." The judge also told the jury that they were not to give the value of an annuity of the same amount as the sufferer's average income for the rest of his life. If they gave that they would be disregarding some of the contingencies; they must give "on the fairest estimate" they could make of what the probable continuance of his pro-

fessional income would have been (and, it may be added, he told them that he could not see that the fact that the doctor enjoyed a considerable income "from other sources" ought to alter the amount they should give him). The jury gave £7000. Two courts approved a new trial, on the ground that this amount was so small that the jury must have left out of account some of the circumstances which should have been taken into it. At the second trial the jury gave £16,000, assumed by the court<sup>1</sup> to be made up of £1000 for the pain and suffering, and £15,000 for three years' average income at £5000 a year. This sum was now attacked as excessive, but unsuccessfully. This case shows that there are some legal rights that it is impossible to reduce to a money standard; only a guess is practicable. Such cases, by the way, are frequently compromised when there is a prospect of a re-hearing, one side or the other fearing to come still worse off; as in a case in 1896, where a jury had awarded a lady £12,000 against a physician for libel and slander, the parties came to terms before the application<sup>2</sup> for a new trial (on the ground of excessiveness) was heard.

Yet a few instances<sup>3</sup> may be given. In an action in 1853 for false imprisonment, for bringing a man before a magistrate on an unfounded charge of felony, only a farthing was given, though a question of character was involved, and a new trial was refused. So it was where only £5 were given in an action in 1780 for maliciously suing out a commission of bankruptcy and holding a man to bail for a large sum, though the aggrieved man showed that it had cost him £30 to set it aside, and the other side did not dispute

<sup>1</sup> The *Times*, December 18, 1879.

<sup>2</sup> *Kitson v. Playfair*, the *Times*, May 1, 1896.

<sup>3</sup> Taken from Mayne on Damages, 1920 and earlier edns.

the case. The same thing happened where, in 1745, £8 were given for an assault, to cure the effects of which cost £18. In 1845 a man lost his thigh through a surgeon's negligence, and the jury only gave a farthing; the court refused a new trial. On the other hand, in 1734, damages were raised from £11 odd to £50 for a severe assault.<sup>1</sup> So where a farthing was given for a broken thigh (the surgeon's bill being £10, the amount claimed), the court in 1843 granted a new trial, saying, "Here are no damages at all." In 1866, a widow brought an action on behalf of herself and her two children to recover compensation from an omnibus proprietor for the death of her husband, who had been run over by an omnibus. He had earned £4 to £5 a week. There was conflicting evidence whether he or the driver was, or both were, negligent; the jury gave the widow £1 and the children 10s. each. The verdict was impugned as "perverse," and a new trial ordered, without the then usual condition of making the appellant pay the costs of the first trial. "The jury have shrunk," said the judge, "from their duty as jurymen in deciding the issue submitted to them, so that we are entitled to look at the verdict as no verdict at all. It is as if they had resorted to the mode of settling the matter by tossing up what their verdict should be" (*Springett v. Balls*, 7 B. & S. 477). If they thought that the deceased was the negligent party, they ought to have said so fearlessly. So in 1916 a man took a friend for a motor ride gratuitously, but owing to the former's want of reasonable care (not amounting to gross negligence) the latter was injured. A jury gave him a hundred pounds, but the Court of Appeal thought this was evidently "a compromise" (between his right to some compensation and the desire not to punish a kind action), for they had actually

<sup>1</sup> *Burton v. Baynes*, Barnes, 153.

disregarded the expenses to which he had been put, and ordered a new trial.<sup>1</sup>

Finally, *Kelly v. Sherlock*<sup>2</sup> (1866) is most instructive. This was an action for libel by a clergyman against a newspaper proprietor-editor. The facts perhaps sufficiently appear from the following passages in the judge's summing-up, after he had expressed "his unqualified opinion that the alleged libels were quite unworthy of an educated gentleman." "I would ask you whether it is possible to say otherwise than that they are publications calculated to defame" Mr. Kelly, "and to expose him to contempt and aversion. Is it possible to say they are fair and reasonable comments upon public matters? I do not see it for my part, but it is a matter for your opinion.

Then comes the question of damages. It certainly is a most unfortunate thing that a gentleman who tells you that he is a minister of religion, and of love and charity, should have managed to embroil himself with so many different people, and about such trash, that he should have been the plaintiff at these assizes in four actions . . . he has brought an action against the churchwardens of his church; he has managed to quarrel with the corporation and with the organist; and has had a scuffle with somebody else, according to the conviction for assault against him." The jury gave a farthing damages. On appeal on the ground of inadequacy, one of the three judges was in favour of a new trial on this ground, saying that they were all agreed, that "regard being had to the number and characters of the libels . . . and to the lateness and meagreness of" Sherlock's "apology for them, a verdict for substantial damages would have been much more satisfactory, and

<sup>1</sup> *Karavias v. Callinicos*, 1917, *Weekly Notes* 323.

<sup>2</sup> L. R. 1 Q. B. 686.

more in accordance with the truth and justice of the case. . . . The judge would have done better to advise the jury that, regard being had to the character, the falseness, and the long continuance of the libels and the inadequacy of the . . . apology in respect of time, and substance . . . the case was not one for nominal damages. . . . Upon the whole, the result of" Mr. Kelly's "appeal to the law of his country, adding as it does, insult to injury, and giving a victory over him to his reviler is, in my opinion, much to be regretted and one which we might well have interfered to prevent."

But the other two judges declined to break the general rule, though one said he would have been better satisfied with higher damages, "as I think that the persistence of" Sherlock "in the reiteration of defamatory statements concerning Kelly, either wholly untrue or grossly exaggerated, was neither sufficiently met by his tardy and meagre apology nor palliated by any actual provocation, which he had individually received." Still, "It is not enough to justify us in setting aside the verdict, that we believe that the jury did not form the same estimate that we might have done of the fact that the libels extended over a long period of time, and reiterated imputations which had been satisfactorily explained. It may suffice to say that, on the amount of damages, it was in the province of the jury to weigh both the matters of aggravation and mitigation, and to determine the result." And the third judge added, "There could be no doubt that the publications were libels, and libels of a gross and offensive character, and if the question had been one of punishing" Sherlock "none could have doubted that the verdict ought to have been heavy. But the question was not what fine ought to be imposed on" Sherlock, "but what compensation ought" Kelly "to have

for his injured feelings; for it is to be observed that there was no pecuniary damage, and that no one who in these unhappy controversies was not already prejudiced against" him, "would think worse of him in consequence of the vulgar abuse of" Sherlock. And after reviewing Kelly's conduct, he continued, "I cannot say that I think the jury were bound to give him substantial damages, though I heartily wish that their verdict had not been such as to give an appearance of triumph to" Sherlock.

But in a later case,<sup>1</sup> where a man said, "He has been convicted of perjury and fined £100"—a false and malicious statement—a jury only gave a farthing damages. Though there was no proof that Mr. Falvey had suffered any actual damage, "yet" in the words of the judge, "there was no evidence whatever that he had done anything to provoke or give the least ground for the slanderous imputation cast upon him, or to show that he had disentitled himself in any way to claim such a verdict as would be practically sufficient to vindicate his character." In these circumstances, the court (like the judge at the trial) came to the conclusion that the jury had not duly considered the matter, "that the verdict was a species of compromise, and, in fact, no true verdict at all," and ordered a new trial.

These cases, of some of which we do not know all the circumstances, are enough to illustrate the general rule that the courts are very reluctant to set aside a jury's estimate because it is too low. It will be noticed that none of these cases is of recent date, and it is possible that to-day that reluctance is smaller.

At any rate, this jurisdiction is much more frequently exercised where the contrary fault—one to which juries are certainly more prone—viz. excessiveness, is alleged.

<sup>1</sup> *Falvey v. Stanford*, 1874, L. R. 10 Q. B. 54.

Here, again, we may borrow a few instances from the same authority as before. The general rule is much the same as in the opposite case, viz. the court will only interfere "if the damages are so large that no reasonable men ought to have given them," as was laid down in an action<sup>1</sup> for libel in 1889, where a jury gave a man £500 against a person who had written to the former's wife a statement, which, even if true, did not necessarily (though it did possibly) impute immorality, but, at the least, unconventionality; two courts refused to interfere. In an action for trespass for forcible entry into a mansion-house, under colour of making a distress for rent, and remaining there for three or four days, in order to assert a title to the property, for which there was not the slightest foundation, a jury in 1835 gave £1000 against the principal, a broker, and his assistants, and the verdict was upheld. So when, in 1845, a landlord caused considerable injury to the crops of his tenant by selling, felling, and removing timber, without applying for leave to enter, and the jury assessed the damages at £300, the court refused to interfere, although the net value of the entire crops did not exceed £200.

*Merest, Esq. v. Harvey*<sup>2</sup> in 1814 was an extraordinary case. Mr. Merest, "a gentleman of fortune, was shooting on his own manor and estate in a common field contiguous to the highway, when" Harvey, "a banker, a magistrate, and a member of Parliament, who had dined and drank freely after taking the same diversion of shooting, passed along the road in his carriage, and quitting it, went up to" Merest "and told him he would join his party, which" Merest "positively declined. . . . But" Harvey "declared with an oath that he would shoot, and accordingly fired

<sup>1</sup> *Praed v. Graham*, 24 Q. B. D. 53.

<sup>2</sup> 5 Taunt. 442.



several times upon" Merest's "land and at birds which the latter found, . . . and used very intemperate language, threatening in his capacity of a magistrate to commit" Merest. "The witnesses described" Harvey's "conduct as being that of a drunken or insane person." The jury gave £500, and Mr. Merest kept it. "I wish to know," said a judge, "in a case where a man disregards every principle which actuates the conduct of gentlemen, what is to restrain him except large damages? . . . What would be said to a person in a low situation of life who should behave himself in this manner? I do not know upon what principle we can" interfere "in this case unless we were to lay it down that the jury are not justified in giving more than the absolute pecuniary damage. . . . Suppose a gentleman has a paved walk in his paddock before his window, and that a man intrudes and walks up and down, . . . and looks in while the owner is at dinner; is the trespasser to be permitted to say, 'Here is a halfpenny for you, which is the full extent of all the mischief I have done'?"

"I remember," said another judge, "a case where a jury gave £500 damages for merely knocking a man's hat off, and the court refused a new trial. . . . It goes to prevent the practice of duelling, if juries are permitted to punish insult by exemplary damages."

In 1764, a special jury at the Guildhall, London, gave Mr. Grey £200 for a black eye, caused by the violence of Sir A. Grant, M.P., who had been provoked by the former's calling him a scoundrel during a quarrel. The court refused to interfere, saying, "when a blow is given by one gentleman to another, a challenge and death may ensue, and therefore the jury have done right in giving exemplary damages." Grey "has been used unlike a gentleman by" Grant "in striking him, withholding his property, and

insisting upon his privilege (of Parliament), all of them tending to provoke him to seek his revenge in another way than by law, and therefore we think the damages are not excessive."<sup>1</sup>

In one of the famous cases of arrest under general warrants, in 1763, arising out of the publication by Wilkes of No. 45 of the *North Briton*, a journeyman printer had been taken into custody by a King's messenger, who had detained him for about six hours, "but used him very civilly by treating him with beef steaks and beer, so that he suffered very little or no damages," a jury awarded £300, which the lucky printer kept.<sup>2</sup> In 1840, Francis, a bank director, gave Edgell, the bank secretary, and the cashier, into custody, "upon a charge of robbing the bank," which, though not true, was not without some colour at the moment. "After being handcuffed, the policeman took them to the cage, where they were locked up until the morning, when they were brought up before a magistrate and discharged."<sup>3</sup> A jury gave Mr. Edgell £200, a sum which was held not to be too great. In 1774, a governor of Minorca had to pay £3000 for wrongfully imprisoning a native for six days, and failed to get a reduction. In 1813 an attorney procured indictments for felony against his clerk in circumstances of great atrocity. The latter was acquitted, and then obtained and retained £2000 damages against his former master. In 1778 a rich usurer, who "out of mere revenge, and without a shadow of pretence,"

<sup>1</sup> *Grey v. Grant*, 2 Wils. 252.

<sup>2</sup> *Huckle v. Money*, 2 Wils. 205. Wilkes himself got £4000 against the Earl of Halifax, the Secretary of State, for about six days' detention (*Dict. Nat. Biog.*), and Mr. Beardmore, "an eminent attorney," £1500 against the same nobleman (*Annual Register*, December 11, 1764, and February 7, 1765).

<sup>3</sup> *Edgell v. Francis*, M. & Gr. 222.

indicted "a man of family, a baronet, an officer in the army, and a member of Parliament," *capitally* at the Old Bailey, had to pay £10,000, the court taking into account the position of the aggrieved man, "which may render the value of an injury done to him . . . adequate to £10,000" and the ability of his accuser to sustain such a verdict. In 1904 a man of twenty-eight who had been injured in a railway accident was awarded £3000 damages. Though the individual members of the Court of Appeal would not have given so much, they declined to interfere because it did not appear that the jury had been influenced by *extraneous* considerations: *Johnston v. G.W.R.* 1904, 2 K. B. 250.

In such cases it is inevitable that the natural indignation of the unsophisticated citizen should express itself, and the law cannot prevent vindictive damages<sup>1</sup> (p. 238 n.<sup>1</sup>). Thus in actions for seductions—in *form* claims for a pecuniary equivalent for the loss of services of the wronged female, and not to be entertained unless there be such loss, and not to be brought by her but by her master or relative who suffers such inconvenience—the law never scrutinises nicely

<sup>1</sup> But even here, the law will exercise control. Where a man's paramour wrote to him a libel "of a very aggravated character" on his wife—with whom he was living, though she afterwards divorced him—"for the purpose of undermining any good will that might continue to exist" between them, and at the trial the wife was cross-examined with the view of showing that her relations with her husband were such that his loss could not be reasonably deemed to be a matter for heavy damages, and the jury awarded the lady £5000 against the libeller, this sum was held to be excessive, and reduced to £1500. The court quite recognised that it was a case for "vindictive or punitive" damages, and that the jury were entitled to enhance them on account of the nature of the cross-examination referred to. "But allowing for that," said the judge, "£5000 was altogether outside reason, and was a sum which no jury could reasonably have arrived at . . . except by taking into consideration matters they had no business to" (*Watt v. Beauchamp*, the *Times*, June 18, 1903. But see *Watt v. Watt*, p. 137).

the amount in which the wrong-doer is mulcted. So in actions for breach of promise of marriage, *nominally* the inquiry is (when the breach is established) into the material loss of the suer; thus in 1835, when a jury gave a jilted lady £3500, in the belief that the offender was a very rich man, the Court<sup>1</sup> agreed to review the verdict on some evidence that his wealth had been exaggerated, though it ultimately came to the conclusion that this was not so, and declined to regard the damages as excessive. But in another such action,<sup>2</sup> in 1890, where the sued had behaved with great baseness, a jury, by awarding £10,000,<sup>3</sup> (reduced to £6500), exemplified the easiness of defeating their own object, for the person in question became bankrupt, a result which often follows "crushing" damages.

Finally, a case in 1884<sup>4</sup> well illustrates the law on this subject. After a trial of very great length, £5000 damages were awarded a sculptor for libel. On appeal, both on the ground that the verdict was against the weight of evidence, and that the damages were excessive—one judge thought that the verdict was wrong, one that it was right, and the third, with whom the first agreed, that the damages should be reduced to £500. To this the sculptor agreed, and accordingly a new trial was refused. But Lawes was not satisfied, and went to the Court of Appeal. But as this was to re-open the whole matter on its merits, this court had to review the evidence, and coming to the conclusion that the verdict was not against the weight of evidence, resolved

<sup>1</sup> *Wood v. Hurd*, 2 Bing. N. C. 166.

<sup>2</sup> *Knowles v. Duncan*, the *Times*, August 13, 1890.

<sup>3</sup> The same sum was awarded in Ireland in a case of *crim. con.* (Annual Register, 1800, December 2).

<sup>4</sup> *Belt v. Lawes*, 12 Q. B. D. 356. See the *Times*, March 18, 1884.

that the original verdict (for £5000) should stand.<sup>1</sup> Incidentally it was determined that the reviewing court has power, with the consent of the suer, to reduce his damages or with the consent of the sued, to increase them—in both cases instead of ordering a new trial, which is, if possible, always to be avoided. But this was overruled in 1905 (*Watt v. Watt*, 21 T.L.R. 386); both parties must consent.

We must now turn to

### 34. Other Grounds of Appeal

Actual misconduct, in the ordinary sense, of juries is rare; but there was a case at Swansea in 1840. "The trial took place in a large room, without anything to separate the jury from the other persons present. It was sworn that in the course of the trial the jury, without the authority of the under-sheriff or stopping of the proceedings, went out and returned smoking cigars. On one occasion some were seen talking to the plaintiff's attorney in an adjoining public-house."<sup>2</sup> The verdict was for the plaintiff, and a new trial was ordered. In 1915 a member of a borough council served on a jury in an action in which his council was sued but won. It was agreed that the verdict was a proper one but a new trial was ordered.<sup>3</sup> Even when the usher of the court was present during a jury's deliberation without saying a syllable a new trial was ordered.<sup>4</sup>

<sup>1</sup> But there is reason to believe that this supplied another instance of the above-mentioned effect of "crushing" damages, i.e. that they are not paid.

<sup>2</sup> *Hughes v. Budd*, 8 Dowl. 315.

<sup>3</sup> *Atkins v. Fulham* B.C. 31 T.L.R. 564.

<sup>4</sup> *Goby v. Wetherill* 1915, 2 K. B. 674.

If a clear, or even a probable, case can be made out that the verdict was obtained by perjury, e.g. if a material witness is actually convicted thereof,<sup>1</sup> there will be a new trial. About 1765 there was an extraordinary case.<sup>2</sup> *Fabrilus* "was a Dane, and the case he made out at the trial was that he had escaped from a Danish settlement in the East Indies with 6000 pagodas (£2400) quilted about his body. (He was present in court, walked to and fro with great agility, and then showed he had 6000 pieces of lead of the size of pagodas concealed and fastened about his body.) That he came aboard one of our East India ships, of which the defendant was mate, and he had deposited these pagodas with him. Some Danish sailors who were aboard swore to circumstances which proved his having the pagodas and putting them into the defendant's hands. Great stress was laid upon the confusion the defendant appeared to be in when the money was demanded of him. A witness, who called himself a Danish consul, swore to circumstances in support of the plaintiff's case. . . . So the jury, to the satisfaction of Lord Mansfield, found a verdict for £2400. (The Danish ambassador sat by Lord Mansfield and interested himself for the plaintiff. Marginal note.) The defendant moved for a new trial upon the ground that the whole was a fiction supported by perjury, which he could not be prepared to answer. That, since the trial, many circumstances had been discovered to detect the iniquity and to show the subornation of the witnesses. The Court, after a very strict scrutiny, granted a new trial on payment of costs. The justice and propriety of the determination appeared in a very strong light to many persons, who thought the whole story to be manifestly a

<sup>1</sup> *Benfield v. Petrie*, 3 Doug. 24 (1781).

<sup>2</sup> *Fabrilus v. Cock*, 3 Burr. 1771.

scheme of villainy, supported by perjury. And the plaintiff never dared to try it again"; he ran away.<sup>1</sup>

Honest mistakes may clearly have the same effect as wilful perjury, and, accordingly, there was a new trial in such a case<sup>2</sup> in 1823.

Akin to these cases are those where the facts are not even known to the losing side at the trial. Thus in 1823, on the oath of Thurtell (afterwards a notorious murderer, who was executed in 1824), a jury awarded nearly two thousand pounds against an insurance company in respect of goods burned in a warehouse. It was strongly suspected that the fire was due to arson, but the judge rightly told the jury that suspicion was not enough; unless they were satisfied that the owner had been guilty of the capital offence, as arson then was, they could not find against him. Nor was it till proof was adduced of the actual conspiracy to defraud the company—showing that the claim "had been supported by a tissue of unparalleled and audacious fraud"—including a sworn confession by an accomplice of Thurtell's in the murder for which, by this time, both were in prison, that a new trial<sup>3</sup> was ordered. So in 1774, where a receipt for a sum, for which there had been a verdict and judgment, was discovered after the trial, a new trial was allowed.<sup>4</sup> But, as in these instances, the "new fact" must be practically conclusive; i.e. it must be tolerably certain that, had it been known the verdict would have been the other way, "unless," as a judge put it,<sup>5</sup> "it can be shown that the

<sup>1</sup> See *Petrie v. Milles*, 3 Doug. 28.

<sup>2</sup> *Richardson v. Fisher*, 1 Bing. 145. But the mistake must be serious and absolutely clear. See 3 T. L. R. 71, in 1886.

<sup>3</sup> *Thurtell v. Beaumont*, 1 Bing. 339.

<sup>4</sup> *Broadhead v. Marshall*, 2 W. Bl. 956.

*Young v. Kershaw*, 81 L. T. 531 (1899).

verdict was based on mistake, surprise, or fraud," there will not be a new trial. The same authority, while setting up the same test in a case<sup>1</sup> in 1902, observed that though there ought to be such new evidence as would probably upset a judgment—in this case there was no jury—that before the Court of Appeal need not necessarily be such as could be produced at the trial; it must, apparently, be enough to convince that court.

Fraud generally, as the means of getting a judgment, is a ground for a new trial<sup>2</sup>; but as the cases are rare, except in the form of perjury, there is no need to pursue the subject (see p. 138).

Probably an unique ground for setting aside a verdict was that accepted (amongst others) by the Court of Appeal in a case<sup>3</sup> where counsel had made disparaging statements about the party opposed to him, without in any way substantiating them by evidence (p. 79). The court could not "appraise how far" these observations had affected the verdict of the jury, who had given £500 damages for libel against the party in question. It thought that, though the judge at the trial dealt with this element, "and no doubt modified it, and the damages might in consequence have been reduced," he had not realised sufficiently how much this departure from the ordinary practice of counsel might have influenced the jury. This is a somewhat *naïve* suggestion that juries cannot distinguish between evidence to facts, and unsupported statements by an advocate, and it implies that they are susceptible to rhetorical denunciation. (Cf. p. 148.) In

<sup>1</sup> *Birch v. Birch*, 71 L. J. P. D. A. 58, see also Cozens-Hardy L. J. in *Bright v. Sellar*, 1904, 1 K. B. 12.

<sup>2</sup> *Williams v. Preston*, 20 Ch. D. 672 (1882), where a solicitor, himself a party sued, put in a fraudulent defence, making admissions; his client got the action reheard and won.

<sup>3</sup> *Wallace v. Cook*, the *Times*, June 15, 1903.



1904, however, the Court of Tennessee decided that an advocate has a perfect right to make a jury weep.<sup>1</sup>

The Court of Appeal may not only order a new trial, which is to restore the *status quo ante*, but may reverse the decision of the court below by giving judgment for the appellant. This naturally occurs much more frequently where the appeal is on a point of law than where there has been a conflict of evidence and findings of fact are impugned, for the judges are the sole authorities on the law, and can therefore rectify an error in law at once, whereas their control over facts they share, in the way we have seen, with the jury, when there is one.

### 35. Costs

"Costs," said a judge in 1860, "as between party and party, are given by the law as an indemnity to the person entitled to them. They are not imposed as a punishment<sup>2</sup> on the party who pays them, nor given as a bonus to the party who receives them. Therefore, if the extent of the damnification can be found out, the extent to which costs ought to be allowed is also ascertained. Of course, I do not say there are not exceptional cases, in which certain

<sup>1</sup> Quintilian had heard "Athenis quoque ubi actor movere affectus velabatur, velut recisam orandi potestatem." (Inst. Or. ii. 16; cf. xii. 10.) In 1916 our own Court of Criminal Appeal, though it commented on the "bad taste of prosecuting counsel in addressing the jury, 'I appeal to you gentlemen to protect young girls from such men as these'—and condemns language likely 'to inflame or prejudice the jurors' mind,' did not disturb the verdict."—*R. v. Banks*, 12 Cr. Ap. R. 74.

<sup>2</sup> But in 1740 the Lord Chancellor (Hardwicke), where a man had been "guilty of the grossest fraud that ever appeared before a court," said, "If I could make him pay exemplary costs, I would do it; but though it was the ancient course of the court in notorious frauds, yet it has been disused for some time from the difficulty of carrying it into execution" (2 Atkyns, 43).

arbitrary rules of taxation have been laid down; but, as a general rule, costs are an indemnity, and the principle is this—find out the damnification, and then you find out the costs which should be allowed.”<sup>1</sup>

This may be taken to represent the theory of the law. In practice, the theory cannot usually be perfectly realised, because it assumes the existence of other theories, from the application of which, as a matter of fact, one side or the other departs. The law assumes that the losing side has necessitated the litigation, and should therefore pay for it<sup>2</sup>; but as a matter of fact, this is not always so: the winning side may be legally as well as morally to blame, or both sides or neither, i.e. there may be no blame in the matter—the law itself may make the litigation necessary. And there are infinite varieties in the distribution of the responsibility between the parties, of whom there may be, and frequently are, more than two. For theory and practice to coincide, we must suppose a suer clearly in the right, a sued clearly in the wrong, and the course of the action so smooth that the former did not indulge in a single penny of expense beyond the strict legal allowance, with the result that when he gets a “clean win,” and judgment with costs, he is awarded not only his substantive claim, but all that it has cost him to vindicate it. But this state of things occurs seldom, if ever; one of the commonest reasons being, that even where a demand is thoroughly justified, the maker in prosecuting it incurs expenses beyond those the law will refund him. Even in the imaginary case supposed, where he does recover every farthing “out of pocket,” he still loses his time in “getting up” his case, and in attending at court, though, as

<sup>1</sup> Baron Bramwell, in *Harold v. Smith*, 5 H. & N. 385.

<sup>2</sup> The general rule applies to appeals, the winner of the final fight getting the costs of *all*, about which see a suggestion (p. 185).

a witness, if he was one, he may be allowed certain expenses: ideal justice would compensate him for this loss, to say nothing of his anxiety. And it is obvious that the law must set some limit to the expense to which a winner has the *right* to put a loser. To take a familiar example, it would be grossly unjust for any one who had a clear case, free of all legal difficulty, to employ three or four counsel at the trial and saddle his opponent with their fees as "costs." Accordingly "costs" are strictly regulated by law.

In the long course of practice the details of this subject have been pretty thoroughly worked out, and a staff of officials,<sup>1</sup> as part of an elaborate machinery, has come into existence to do justice in each case in this respect. Nothing can here be attempted except an outline of the general principles relevant.

In all cases, the proper authority on costs is the authority who decides at the hearing—the judge at the trial,<sup>2</sup> a court or judge of appeal, when the appeal is determined, or the official who decides preliminary points before a trial, at the time he so decides. From that discretion sometimes there is no appeal,<sup>3</sup> unless a question of law arises, i.e. it is contended that some order for costs is bad in law. In all cases where costs must be asked for, they must be asked for at the conclusion of the hearing or trial to which they relate, for then the merits are fresh in the mind of the judicial authority; though of course he may, if it is convenient,

<sup>1</sup> Called taxing masters (*taxare* = to criticise or challenge).

<sup>2</sup> Apparently at one time the jury had a voice in this matter. "The jury, by the judge's favour, did give us but £10 damages and the charges of the suit."—Pepys, June 3, 1663.

<sup>3</sup> And "the House of Lords will not entertain an appeal against costs only" (*Caledonian Railway Company v. Barrie*, 1903, A. C. 126).

reserve his decision on the point, or have the question argued at some future time.

The general rule is that costs follow the event, i.e. the successful party is awarded some costs from the unsuccessful. What are these? It is impossible to enumerate them, because in each case they depend on the particular circumstances. Nevertheless, certain principles have been fixed in the course of centuries, and these are administered by experienced officials.

As an illustration (merely) of a common type of the costs allowed between party and party,—Mr. Gordon, in his book on *Costs* (1884), p. 152, says that a successful plaintiff's costs, "independent of the result of particular issues," i.e. subsidiary points on which he may have failed and got no costs, or even been ordered to pay the costs, include charges for:—"letter before action: instructions to sue: writ: service of writ: search for appearance if no notice of appearance having been entered is given: claim, or notice in lieu of claim: instructions for claim: reply: attendance to deliver claim: and subsequent pleadings, if delivered: instructions for same: all necessary and proper perusals: notice of trial: setting down cause: attendance at the trial: instructions for brief: drawing brief and copy for counsel: copies of necessary documents: counsel's fees," etc.

"A successful defendant's costs of the cause include—instructions to defend: undertaking to appear: entering appearance: notice of appearance: perusing statement of claim: instructions for defence: drawing same, delivery of pleadings: instructions for rejoinder and drawing of any rejoinder, attendance at trial: brief for counsel, etc., as in the case of plaintiff." The generality of the rule (above) may be illustrated by the following case<sup>1</sup> in 1880: An

<sup>1</sup> *Cooper v. Whittingham*, 15 Ch. D. 501.

English firm, agents of publishers in New York, received a consignment of copies which infringed an English copyright. They were innocent in the matter, and upon receiving a warning from the copyrighter they determined not to sell the copies, and were willing to give a promise to this effect; but before they could do this, an injunction was sought against them, "importing for sale" being a clear offence under a Copyright Act, and they had to pay the costs of the action. "As I understand the law," said the judge, "of costs it is this, that where a plaintiff comes to enforce a legal right, and there has been no misconduct on his part—no omission or neglect which would induce the court to deprive him of his costs—the court has no discretion, and cannot take away his right to costs. There may be misconduct of many sorts: for instance, there may be misconduct in commencing the proceedings, or some mis-carriage in the procedure, or an oppressive or vexatious mode of conducting the proceedings, or other misconduct which will induce the court to refuse costs; but where there is nothing of the kind, the rule is plain and well settled. . . . It is, for instance, no answer where a plaintiff asserts a legal right for a defendant to allege his ignorance of such right, and to say, 'If I had known of your right I should not have infringed it.' . . . I have often remarked that there is an idea prevalent that a defendant can escape paying costs by saying, 'I never intended to do wrong.' That is no answer, for as I have often said, some one must pay the costs, and I do not see who else but the defendants who do wrong are to pay them."<sup>1</sup> So much for the general rule. Costs follow the event, and are taxed on the "party and party" scale. (See p. 161.)

<sup>1</sup> But the *strictness* of this rule has, perhaps, been since modified (see p. 157).

## A.—JURY TRIAL.

Now for the first important exception. If there has been a jury, the judge may, "for good cause,"<sup>1</sup> deprive the successful party of his costs. Naturally there has been much discussion about the meaning of "good cause." The law was laid down in the following case.<sup>2</sup> One of Bostock's servants occupied an open space in Ramsey with his menagerie for fifteen hours, despite the prohibition of the local authority. Some months after, criminal proceedings, characterised by a judge as perfectly "puerile" and involving Bostock, who lived at Glasgow, in great inconvenience and some expense, were taken at Huntingdon for an unlawful obstruction. The judge there "made some strong comments" on the case, and soon directed the jury to acquit. Thereupon Bostock brought his action for malicious prosecution; but the judge, holding that the council had reasonable and probable cause for their action, and had not acted maliciously, decided in their favour and withdrew the case from the jury, but at the same time deprived the winners of their costs in view of their conduct; saying, "I am of opinion that the judge is not confined to the consideration of the defendant's conduct in the actual litigation itself, but may also take into consideration matters which led up to and were the occasion of that litigation. In the present case I think I am entitled to look at the antecedent conduct of the council, which led to the apparent necessity of Bostock to vindicate himself against the charge which had been brought against him." And the Court of Appeal—for there is an appeal on what is "good cause"—thought so too.

<sup>1</sup> Rules of the Supreme Court, Order 65, rule 1.

<sup>2</sup> *Bostock v. Ramsey, etc., Council*, 1900, 1 Q. B. 357, and 2 Q. B. 616.

Here, then, the sued, though successful, was deprived of costs, and this case merely followed the principle of another, a striking case<sup>1</sup> in 1880, where the successful suer was deprived of his. A doctor brought an action for libel against a lady who, in a letter to a rich old woman whose affairs he had formerly managed, and who was just coming out of an asylum, wrote, "Mind you keep away from that doctor; you know what he brought you to before," and a jury gave him £10 damages, but the judge deprived him of the costs, saying, "The libel was of a very mild character, but the reason I deprived" him "of costs was this, that I thought he had brought the whole thing on himself. The old woman was evidently of weak intellect, and he had got hold of the whole of her property so as to excite very just suspicion on the part of the neighbours. . . . Then" Harnett "was induced to give up the money he had got, and this was a kind letter . . . to the old woman who was coming out of the asylum. The verdict, to my mind, was inexplicable . . . and I came to the conclusion that it was just the case in which the court is to interfere." Another judge thought that the jury might have been perfectly justified in their verdict, and the judge equally so in holding that if the suer "had been a person with proper feeling he would not have brought the action," and that the proper course had been taken, and this view prevailed in the Court of Appeal, where it was said, "The jury are not judges of the costs of the action,<sup>2</sup> and on the other hand, the judge, in

<sup>1</sup> *Harnett v. Vise*, 5 Ex. Div. 307.

<sup>2</sup> But they often try to be. In *Kelly v. Sherlock* (above p. 129), the jury could not agree, and came into court and asked, "What verdict would carry costs?" The judge told them it was no business of theirs, "otherwise they might defeat the law," because, "it says, in certain cases, for the prevention of frivolous actions, if the plaintiff does not recover a certain amount, he shall try his action at his own

exercising this jurisdiction . . . must not take upon himself to overrule the verdict of the jury, and has no right to say that the particular thing complained of was not a libel. . . But [N.B.] the amount of damages given by the jury is not to be considered as conclusively establishing any remaining matter at issue. Every judge would take it as a material element in considering whether this jurisdiction . . . is to be exercised or not. But it is the duty of the judge who tried the case, and the duty of the Court of Appeal also, to consider the whole circumstances of the case, everything which led to the action, everything which led to the libel, everything in the conduct of the parties which may show that the action was not properly brought in respect of the libel. . . . I am satisfied that this letter never did, or could have done, the slightest harm to" Harnett, "and further, that it was not the true cause of the litigation. . . . I cannot but think that the sum of £10 was not awarded as the measure of any damage due to the letter, or as the measure of injury to the wounded feelings of" Harnett, "but was obtained through the eloquence and skill of his counsel, who managed to impress upon the jury that a less sum would not be sufficient to send Harnett home with his character cleared. In fact it was given as a response to the appeal to their feelings. . . . I think that the judge was justified in holding that the £10 . . . was not substantially different from 20s. . . . It would be doing injustice to the " sued "if we were to make her and her husband pay costs on account of this incautious letter."

But even where there is no misconduct, a successful suer may be deprived of some of his costs. Forster took a house expense. . . . You ought to say, 'We will give a certain amount,' but the amount ought not to be regulated by its effect upon the costs." There can be no doubt that the jury sometimes intend to give costs, and no more.



on lease from Farquhar and others on their agreeing to make the drainage good, and occupied it with his family. Soon after his children and some of his servants were attacked by scarlet fever, which the doctor put down to the defective drainage, which was then examined and found to be amiss. Thereupon he brought an action<sup>1</sup> against Farquhar, etc., claiming for medical attendance, etc., £217 19s.; cost of disinfection, etc., £109; costs of removal, etc., £40; fees, etc., of sanitary engineer, £26 18s. 6d. But doctors testified that the scarlet fever was not due to the defective drainage, and so the jury found, though they gave him £12 12s. in respect of engineers' fees. Thereupon the judge ordered him to pay his opponents' costs in respect of the other three items, and this order was strongly confirmed in the Court of Appeal. "As a matter of reason," said one judge, "it is clear that a successful litigant need not have been guilty of injustice or oppression to make it unfair that he should cast on his opponent all the costs of litigation. The measure of what is fair in costs is not to be found in a mere consideration of his conduct towards the opposite side. It may have been reasonable, from his point of view, to do that which it would be unreasonable to make the opposite litigant pay for." And he recited a remark of Lord Halsbury's, viz. "I cannot entertain a doubt that everything which increases the litigation and the costs, and which places on the defendant a burden which he ought not to bear in the course of that litigation, is perfectly good cause for depriving the plaintiff of costs."

A few lines from this judgment may be added as illustrating what has been said (pp. 49-50) on another subject. "It is said by" Forster "that the various items of damage claimed do not create separate issues in the pleader's sense,

<sup>1</sup> *Forster v. Farquhar*, 1893, 1 Q. B. 564.

nor for the purposes of taxation. That is perfectly true, but it is a mere technicality of pleading and of the taxing office which has survived to us from the time when pleadings were more accurate, and when the term 'issue' had a recognised meaning with respect to them. . . . For all purposes of justice, these separate heads of controversy were different issues, though not different issues or issues at all, in the sense in which pleaders use the term. Why should" Farquhar, "whose defence has succeeded on the most expensive, the most important of these heads of controversy, bear the cost of litigating it?" In earlier days Mr. Forster would probably have got the whole of the costs.

Or again, when the misconduct is rather general than relevant to the particular case, a successful suer may lose his costs. In 1889 a jockey brought an action<sup>1</sup> against a newspaper for a libel alleging that he had "pulled" his horse in two races. The jury gave him a farthing, and the judge took away his costs. The higher court refused to interfere, for, as one judge said, "as a matter of business no jury would give a plaintiff merely a farthing damages if they believed that his evil reputation was not founded upon truth. . . . The jury meant that this jockey had this evil reputation," and that, though he had not pulled this horse, he had been in the habit of pulling before. "If that were so, a man with such a character had no right to bring the action, and he acted oppressively in doing so." Clearly, then, the smallness of the damages is an element the judge must take into consideration in deciding on costs.

There is even a step farther possible in the disciplinary use of costs, and that is actually making a successful suer

<sup>1</sup> *Wood v. Cox*, 5 T. L. R. 272.

pay the costs of the sued. In 1888 an action<sup>1</sup> for libel was brought against a newspaper and its editor-manager, and at the same time the latter sued his opponent for slander. After four and a half hours' deliberation, the jury found for Myers on both claims, with a farthing damages for the former; on the slander, they found that Myers had not intentionally slandered the editor. The judge ordered Myers to pay the costs of the other side on the claim for which he had got a farthing, and deprived him of his costs (and no doubt, if he had had the power, would have made him pay the opponents') on the claim on which they had failed. The judge was evidently dissatisfied with the verdict; he thought, having regard to the time taken to find it, it was in the nature of a compromise, and it appears from his remarks that Myers's charges were untrue and unwarranted against persons who had completely exculpated themselves, and that it was these charges which had led to the retaliatory paragraph in the newspaper found to be a libel.

So the sued, though successful, may be deprived of his costs. The following is a strong case,<sup>2</sup> because one appeal judge thought that "the charge totally broke down" against such a person. Smith, a brother-in-law of a bankrupt, asserted that two valuable policies of insurance on the latter's life were his, as security to the extent of his advances to him; the trustee in bankruptcy alleged that this was "a concoction and a fraud," and claimed the policies for the creditors. At the trial certain discrepancies came out between Smith's evidence then and previous evidence in the

<sup>1</sup> *Myers v. The Financial News and Others*, 5 T. L. R. 42. So *Whitmore v. Reilly*, 1906, 2 Irish Reports 357. But it is an exceptional course: *Red Man's Syndicate v. Associated Papers*, 26 *Times Law Reports* 394, 1910: libel.

<sup>2</sup> *Sutchffe v. Smith*, 2 T. L. R. 881, 1886. It must be a very strong case indeed. See *King & Co., v. Gillard*, 74 L. J. Ch. 421, in 1905.

bankruptcy about these advances and entries relating to them, but the jury found in his favour. The judge deprived him of costs on the ground that his accounts were of a suspicious nature, and that, by his evidence in the Bankruptcy Court, he had brought the litigation on himself, as the trustee was justified in further inquiry, and by two to one, the judges above thought that the judge had good cause. "Whenever," said one of the two, "a defendant had, by his mis-statements, made in circumstances which imposed an obligation upon him to be truthful and careful in what he said, brought litigation on himself and rendered the action reasonable, there would be good cause to deprive him of costs. For some reason or other," Smith "told a falsehood in the bankruptcy proceedings, and, having done so, his creditors might well believe his whole story was false."

### B.—JUDGE WITHOUT JURY.

But though a successful suer may thus (in extreme cases) be made to pay the costs of the sued, the converse is not true—there is no power to make the sued, who is successful, pay all the costs of his opponent. The most he can be mulcted in is, said Sir George Jessel, in 1881, "perhaps the greater part of the costs by [the court] giving against him the costs of issues<sup>1</sup> on which he fails, or costs in respect of misconduct by him in the course of the action. But a judgment ordering the defendant to pay the whole costs of the action cannot, in my opinion, be supported unless the plaintiff was entitled to bring the action,"<sup>2</sup> i.e. wins. "There is," said another judge in the same case, "an essential difference between a plaintiff and a defendant. A plaintiff

<sup>1</sup> e.g. *Forster v. Farquhar* (p. 149).

<sup>2</sup> *Dicks v. Yates*, 18 C. D. 76.

may succeed in getting a decree, and still have to pay the costs of the action, but the defendant is dragged into court and cannot be made liable to pay the whole costs of the action if the plaintiff had no title to bring him there." One of the cases on which this doctrine was founded, and by which it is illustrated, was a miserable squabble in 1853 between an attorney and his clerk about the premium for the latter's articles, and was remarkable for the following exordium<sup>1</sup> by Lord Justice Knight Bruce: "This is a conflict of demerits, the question being whether the, very bad case of the defendant is not equalled or exceeded by the badness of that of the plaintiff. A series of Vice-Chancellors have refused to have anything to do with these parties, and they have accordingly now bestowed themselves here [in the Court of Appeal]. The suit . . . is one for which the defence must be the apology, and the badness of which almost apologises for the defence. The money sought by the claim . . . is, in a sense, due from the defendant to the plaintiff, and perhaps it is as clear that the defendant ought to pay it as that the plaintiff ought not to receive it." And he added: "There is much to regret on both sides. I think the plaintiff was ill-advised in bringing this claim forward at all; but when brought forward, it certainly should have been met in a different manner. It has been met in a manner neither justifiable nor excusable. . . . I think" making the sued, though successful, pay costs, "a jurisdiction of considerable delicacy and difficulty. . . . There are here . . . passages of affidavits filed by the defendant which go beyond the ordinary and proper licence—which go into the private life, truly or untruly, of the plaintiff, and into his general habits in a manner which cannot be requisite." (He was charged with gross neglect of his duty,

<sup>1</sup> *Dufaur v. Sigel*, 4 De G. M. & G. 520.

habitual drunkenness, immorality, profligacy, and incapacity.) In the result, the attorney lost his action, but his clerk had to pay him £20 "for the impertinent matter contained in the affidavits," and, of course, got no costs.

In this respect a County Court judge is in the same position as a High Court judge, as the following case<sup>1</sup> shows. Andrew sued Grove for the amount of a bet. The latter set up the Gaming Acts, i.e. that the contract was one which could not be enforced by law. Grove was called as a witness by Andrew (who had probably no other means of proving that there had been a bet), and he denied that the bet had been accepted or made. The judge decided in favour of Grove, but ordered him to pay Andrew's costs on the ground that he did not believe a word of his evidence, and thought that he had perpetrated a swindle. But three judges without hesitation reversed the order that the winner should pay the loser's costs.

Intermediate between the extremes of liability are the cases of varying deserts of the parties *inter se*. Where there was complicated litigation and a nine-days' trial between a corporation<sup>2</sup> and an individual, the judge, having given the successful corporation "the general costs of the action," went on, "but a very considerable amount of time and money have been expended upon the *bona fides* of" Pickles "with respect to which the corporation have failed, although" he "has not been successful" (that is, apparently, they had not made out their case, but he had not satisfied the judge of his good faith). "It would be impossible for any taxing master to distinguish or apportion the costs, with any approach to accuracy; and I think that, having heard the case, I can deal with them much better myself. I

<sup>1</sup> *Andrew v. Grove*, 1902, 1 K. B. 625.

<sup>2</sup> *Bradford v. Pickles*, 1894, 3 Ch. 71.

therefore take upon myself to . . . order" that the loser pay half the amount of the corporation's taxed costs. The judge's decision on the main issue was afterwards reversed, but there could be no question about his power of dealing thus unusually with the costs.

The possibilities of the distribution of costs are, perhaps, enumerated in the following words of a judge of Appeal in a case<sup>1</sup> where A., having brought an action against B., and B. against A. in respect of the same matter, a judge had dismissed both actions, but, thinking that B.'s allegations were frivolous, had made him pay certain costs. "The judge has a large discretion about costs; he may make the defendant pay the costs of some of the issues in which he failed, although he may have succeeded in the whole action. Or he may say that both parties are wrong, but that he could not apportion the blame in a definite proportion, therefore would dismiss the claim with costs. Or he might say that the plaintiff should have half the costs of the action, or some other aliquot part.<sup>2</sup> Or he may follow the course which I some-

<sup>1</sup> *Willmott v. Barber*, 17 Ch. D. 774, in 1881.

<sup>2</sup> So in 1902 a judge remarked that the "form of dividing the costs according to the issues . . . though logical and strictly right, gives rise to a great deal of trouble. The costs of an issue, or costs increased by a particular claim, do not connote by themselves any of the general costs of the action; and, therefore, when the matter comes before the taxing master, great difficulty occurs in distributing the general costs of the action, and notwithstanding the great knowledge and experience of the taxing masters, the difficulty is often not satisfactorily solved. Sometimes it is possible with some care at once to say that the party who is to pay costs shall pay a certain proportion of the whole costs, and, if that can be done, time and expense are saved. Of course, such a method is necessarily rough, and in the nature of an estimate; but still, I cannot help thinking that such a rough estimate is just as likely to do what is right as the more logical and precise method" (*Weekly Notes* (1902) 49). This method, it seems, is reserved for cases of much or intricate detail, complete investigation into which would be protracted or impossible. Thus, in 1902, where an infringement of trade marks

times adopt, and I generally find that the parties are grateful to me for doing so, namely, fix a definite sum<sup>1</sup> for one party to pay to the other so as to avoid the expense of taxation, taking care in doing so to fix a smaller sum than the party would have to pay if the costs were taxed . . . there is no appeal from the discretion of the judge."

It will be noticed in this passage that the arbiter of costs is "the discretion of the judge." This discretion replaces, where there is no jury, the "good cause" which must exist where there is a jury, or, rather, the good cause for departing from the general rule in the former case is a matter for the judge's discretion, and it will be also noticed that the last four (High Court) instances of departure from the general rule were decisions of a Chancery judge sitting alone.<sup>2</sup> Practically there is no difference between the two kinds of judicial control, for both aim equally at equity in the given circumstances; but technically, while there is an appeal on "good cause," there is none from the judge's "discretion." Still, it has been laid down that "wide though the discretion is, it is a judicial discretion, and must be exercised on fixed principles," and where, as in one of the last cases cited, the wrong principle has been applied to costs, the reviewing

was alleged, and the chief evidence went back to 1892, and some evidence even to 1876, and there were two hearings, and each party was partially successful (and it probably would have been impossible to fix each party exactly with the costs for which he was liable), the judge lumped the two sets of costs together, and bade one party pay the other two-fifths of the aggregate, believing that thus he did "substantial justice," and that such an order was "in mercy to the parties and to the taxing master" (*Bourne v. Swan and Edgar*, 1903, 1 Ch. 230).

<sup>1</sup> This is now constantly done, especially where the fund to be dealt with is small.

<sup>2</sup> In the Court of Chancery the tradition has been generally in favour of a more liberal scale of costs, and now the practice of the High Court has been assimilated to that of this Division, for the historical reasons for which see p. 173.



court will interfere. But where that discretion has been exercised it will not interfere. Thus, where a man, by erecting some buildings, and especially a wall, obstructed his next door neighbour's light for a time, but on the latter's remonstrance, offered to give him full satisfaction without litigation, and soon after when the latter took an action against him, renewed his offer in effect, and on this, too, being refused, pulled down the wall but went on with the rest of the building, and when the action against him was heard, the judge, evidently thinking that the action might have been dispensed with, awarded £2 against him, *without* costs, for the obstruction to the light while the wall was up, but on the claim for injury to his neighbour's premises, through his building work, found in his favour, *with* costs, the court above held<sup>1</sup> that there was no appeal from the decision on costs, and it must be obvious from this brief reference to the facts that, if there had been a jury, there would have been very "good cause" for that decision. So where small retail dealers had innocently bought five hundred cigarettes, valued at 17s. 6d., which, in fact, infringed a trade mark, and returned the great bulk of them when they found out the fraud, the judge, while he held that he must prohibit them from selling the spurious goods, declined to give costs against them, as he did not think such actions should be encouraged.<sup>2</sup> This case was cited and followed in 1892 as modifying the strictness of the general rule laid down in 1880 (p. 145, *Cooper v. Whittingham*) in an action<sup>3</sup> the *Times* brought against the *St. James's Gazette*, for infringement of copyright in an article by Rudyard Kipling, and in certain paragraphs. The case was abundantly clear about

<sup>1</sup> *Florence v. Mallinson*, 65 L. T. 354, in 1891.

<sup>2</sup> *American Tobacco Company v. Guest*, 1892, 1 Ch. 630.

<sup>3</sup> *Walter v. Steinkopf*, 1892, 3 Ch. 500.

all the "copy," but, for the article, the latter journal, on a given date, was willing to give the required undertaking not to publish it further. It was not shown that the former journal had suffered any damage, and the judge, while commenting very strongly on piracy of this sort, yet, in view of the "notorious practice" for twelve years of the latter of making extracts from the former "without any objection or complaint," and of their being then summarily "pulled up" all at once without notice, he made no order on the paragraphs and (practically) gave no costs, and for the substantial grievance of the article, he only allowed costs—or, at any rate, very little more—down to the date in question, that is, on the basis of the undertaking having been accepted.

It is clear that it is sometimes morally right to communicate with the other side before going to law, and the omission may affect the costs, but "it never has been the law . . . that a defendant should always have notice of the intention to bring an action before it is brought." Thus, in a clear case, where the sued offers *everything* (including costs) the suer could at the moment obtain, the latter ought not to go to law merely to heap up costs; if he does, he may lose<sup>1</sup> his case and have to pay the former's costs. Moreover, if, of two or more technical ways of proceeding, the dearer is chosen, there is provision for cutting down the costs to the scale of the cheaper.<sup>2</sup> Again, where the original claim is admitted and satisfied, but not the proper costs incurred so far, e.g. where a man pays the debt sued for, but not the subsidiary legal expenses claimed therewith, there is a simple process to enforce the incidental demand.<sup>3</sup>

<sup>1</sup> *Snuggs v. Seyd*, 1894, *Weekly Notes* 95.

<sup>2</sup> *Attorney-General v. St. John's Hospital*, 1893, 3 Ch. 151.

<sup>3</sup> *White Book for 1921*, O. 65, r. 1, p. 1195.

C.—SCALES OF COSTS.

In the High Court there is power to allow some costs, published in a list, on a higher scale, "if on special grounds arising out of the nature and importance or the difficulty or urgency of the case," the judge<sup>1</sup> thinks fit to do so. The condition is strictly construed, and "consequently" it is stated,<sup>2</sup> "neither the mere bulk of the case, whether in subject-matter or in time occupied<sup>3</sup> . . . nor the fact that charges of fraud or negligence are made, nor all these incidents together constitute 'special grounds.' " Nor, it seems, does "extraordinary ability and diligence on the part of the solicitor." The higher scale, however, is usually allowed in election petitions, patent actions in which scientific evidence is given, where there is much scientific evidence of a technical character, or the point at issue is more suitable for an electrical expert than for a judge, or numerous foreign documents are involved, and it has been allowed in a trade-name case of great importance.<sup>4</sup> It may be taken that it is rarely allowed.

In the County Court, costs are normally awarded definitely on one of three possible scales (in addition to that where the amount at stake is not more than £10, in which case the scale of costs is very low indeed, though it is even lower beneath £2), viz. where the subject-matter or the sum recovered is (a) between £10 and £20, (b) between £20 and £50, (c) over £50. But the judge has a very large discretion,<sup>5</sup> larger than that of the High Court judge, both about the scale to be applied in any particular case, and about

<sup>1</sup> *ibid.*, p. 1245, r. 9.

<sup>2</sup> *ibid.*

<sup>3</sup> *Amalgamated Properties of Rhodesia v. Globe and Phoenix*, 1916 W. N. 414 lasted 150 days, and there were 50,000 questions and answers (oral only).

<sup>4</sup> *ibid.*, p. 1248.

<sup>5</sup> Cp. p. 117.

any particular item of costs, provided (when it is a question of scale only) that he "certifies in writing that the action involved some novel or difficult point of law, or that the question litigated was of importance to some class or body of persons, or of general or public interest" (sec. 119 of the County Courts Act, 1888). For the principles on which he may deviate from the general rules for distributing costs, they are much the same as those holding in the High Court already touched on. Perhaps there is a greater facility of appeal on costs to a County Court judge (i.e. from his chief officer, the registrar, who usually settles the details in the first instance) than there is from the corresponding decision of a High Court judge. And, generally, his decision on costs is final; it can only be reviewed on the suggestion that he has made a mistake in law.

Care is taken, when the result of an action in the High Court shows that it might have been brought in the County Court, i.e. where not more than £100, the usual limit of the lower jurisdiction, is recovered, that the costs are settled, as a rule, according to the scale of that court, which is designed to be less burdensome than that of the High Court.

So much for the general principles on which costs are allowed or withheld. There still remains for litigants the vital question, how the order for costs is understood, i.e. what items are to be paid. In the rare case, where a lump sum is awarded or agreed upon, there is an end of this matter. In almost every other there is an official taxation (p. 143), and the sum to be paid in the result depends on the mode of taxation ordered.

The object of taxation, of course, is to prevent (1) an opponent, (2) any client being saddled with unnecessary or unfair expenses.

The following broad rule is officially laid down<sup>1</sup>: on every taxation the taxing-master shall allow all such costs, charges, and expenses as shall appear to him to have been necessary or proper for the attainment of justice, or for defending the rights of any party, but save as against the party who incurred the same, no costs shall be allowed which appear to the taxing master to have been incurred or increased through over-caution, negligence, or mistake, or by payment of special fees to counsel, or special charges or expenses to witnesses or other persons, or by other unusual expenses.

Subject to this rule, the following main distinction is observed: (i.) the loser may have to pay the winner all that the latter would be bound to pay his own solicitor for the litigation. The amount thus due from client to solicitor may be, and generally is, fixed by taxation at the instance of the loser; (ii.) the loser may be ordered to pay not all of the winner's costs, but only such as are usual between party and party. These, too, are settled by taxation.

The second—"party and party" costs—is by far the commoner case; indeed, the former is almost unknown except in the Chancery Courts. The general principle is that the winner shall only get from the loser the expenses necessary to gain his cause; everything beyond that is a luxury which he must pay for himself. For instance, in his anxiety, he may bring up an unnecessary number of witnesses, or may institute too many or too lengthy inquiries, or authorise needless journeys, or insist on employing a third or fourth counsel, or on paying a very high fee to retain a particular one. Except in very special circumstances he will never recover money thus spent. Obviously, what is necessary in each case depends on its peculiar facts, and

<sup>1</sup> *Annual Practice*, 1921, O. 65, r. 27 reg. (29).

though practice has established a more or less rigid use, a discretion is permitted to the experienced officials who pass the bills.

But under this system, it can hardly ever happen that the winner can recover *all* he has to pay his own solicitor, and therefore, so far as costs are concerned, he will be out of pocket through vindicating his right. To mitigate (though not entirely<sup>1</sup> to satisfy) this loss, the bill is sometimes calculated by the former mode, as between solicitor and client.

Obviously, a solicitor dealing with his own client, in consultation how their case shall be conducted, is in a very different position from that of a loser ordered to pay his opponent's costs. The solicitor may very well point out the most that can be done to ensure success, and must point out the least that ought to be done. The client knows his own means, and if he says, "Leave no stone unturned," the solicitor is bound to obey by all fair means. But he is bound to "protect his client, even against himself, if necessary," as a judge said;<sup>2</sup> and, therefore, if any unusual or heavy outlay is contemplated, he must warn him that he cannot rely on recovering it from the other side, but must be prepared to bear it himself. Clearly, then, if the solicitor does his duty in this respect, he will be allowed to incur expenses much more liberally than when he looks for remuneration from the other side; and if he does not do his duty, he may find himself liable to pay any improper expenditure out of his own pocket. Thus, while taxation between solicitor and his client in litigation protects the

<sup>1</sup> Though in 1846 a judge said, "The general view adopted with respect to taxation between the parties as between attorney and client is that they shall be so taxed as that the other party shall have no costs at all to pay" (*Lipscombe v. Turner*, 4 D. & L. 131). Such a view, however, is ideal.

<sup>2</sup> *In re Blyth*, 52 L. J. Q. B. 189 (1882).

latter from overcharge<sup>1</sup>—and any client, winner or loser, may demand it—it also protects the loser on those exceptional occasions when he is ordered to pay the winner's costs, "as between solicitor and client," for though these, as we have seen, are more liberally allowed than "party and party" costs, yet they do not include more than the solicitor could claim, as a matter of course, from his own client, though, as a fact, more are sometimes incurred. But when this special order is made, it is expressly meant to give more costs than are usually allowed between party and party—in fact, to be as nearly as possible an indemnity; for instance, it allows the costs of taking counsel's opinion before litigation. But it "is seldom made between hostile litigants,"<sup>2</sup> being usually reserved for trustees, executors, administrators, etc., who do not profess to act in their own individual interest, and whose costs come out of an estate or fund rather than an individual pocket.

Even on this system a winner may not recover absolutely all his costs from the loser. If any clearly unnecessary expense is to be incurred, his solicitor must expressly stipulate with him that he shall, in any event, pay it, in which case it would obviously be improper to expect to recover it from the other side. "Fair justice to the other party" is the criterion.<sup>3</sup>

An instance<sup>4</sup> will illustrate these regulations. In 1882

<sup>1</sup> Smollett satirised (about 1753) the "piling up" of costs against a client. "He found he had incurred the penalty of three shillings and fourpence for every time he chanced to meet the conscientious attorney, either in the park, the coffee-house, or the street, provided they had exchanged the common salutations; and he had great reason to believe the solicitor had often thrown himself in his way, with a view to swell this item of his account" (*Count Fathom*, ch. xxxvii.).

<sup>2</sup> *Encycl. of Laws: Costs*.

<sup>3</sup> Daniell's *Chancery Practice*, ch. xviii. sec. 4.

<sup>4</sup> *In re Blyth*, 52 L. J. Q. B. 186.

In a case<sup>1</sup> in 1867 the judge referred to "the accumulation of letters charged for, which are obviously very numerous. I have not counted them, but I am informed that they are 165 in number, for each of which 5s. is charged, being about £40. It is difficult to understand how the business could have required so many letters to be written . . . of (some) it may certainly be said that they were not required for the purpose of advancing the interests of his client. If a solicitor were to write every day to his client, giving him information, even though useful and interesting, he cannot charge for them unless properly written in his character of solicitor, and for the purpose of advancing the business of the client.

If a solicitor were to write daily to his client complaining of one thing and making inquiries about another thing, unless they properly relate to the business he is conducting he cannot charge for them . . . the client taxing the bill may require the judgment of the taxing master. I think that this judgment in most cases should be exercised liberally towards the solicitor"; but the four bills here in question were ordered to be taxed.

#### D.—TRUSTEES, EXECUTORS, ETC.

These may even get more than "solicitor and client" costs; they may get every penny of expense properly intaxed after payment at £280. The Court of Appeal, following the last case, although there were special circumstances certified, held that the bill delivered was £362, and that the solicitor must pay the costs of taxation, the special circumstances not being such as to induce the court to depart from the ordinary rule." In another case, "the bill, of which more than one-sixth had been taxed off, exceeded the sum which the solicitors had been willing to take; no costs of taxation were allowed to either party." In this case the judge said, "The object of the Act is to make solicitors careful in drawing bills of costs, so that they should not charge more than they ought" (*Re Elwes*, 58 L. T. 580).

<sup>1</sup> *Re Brady*, 15 *Weekly Reporter* 632.



curred. The chief occasions are: "when personal representatives," i.e. executors or administrators (according as the former exist—which generally happens by appointment in the deceased's will—or not) "and trustees are entitled to costs out of the fund." . . . But, in general, these costs will only be allowed "in cases in which there is a fund under the control of the court; where there is no such fund or an action against the trustees is dismissed, the costs awarded to the trustee will be only the ordinary costs. In special circumstances, however, costs as between solicitor and client have been given where there was no fund under the control of the court."<sup>1</sup> Another instance is in administration actions,<sup>2</sup> and there are others.<sup>3</sup>

Now, trustees, executors, etc., and solicitors are looked on in a special light by the courts (and especially by the Chancery Courts, see p. 219), the former with favour and the latter with scrutiny in the article of costs, because while both classes must necessarily have much confidence placed in them in discharging their responsible duties, the latter are paid, while the former are not; while in the event of any failing in the performance of their peculiarly fiduciary obligations, both are equally severely visited. So the same authority says, "Trustees, agents, and receivers, accounting

<sup>1</sup> Daniell's *Chancery Practice*, ch. xviii. sec. 4.

<sup>2</sup> "Administration is where the rights of one or more persons in relation to an estate, property, or collection of assets are adjusted and protected. The term is applied to the duties of executors, administrators, trustees, liquidators, etc., in managing the property committed to their charge, paying debts, dividing the surplus assets, etc. These duties frequently have to be performed under the direction or supervision of a court, and this part of its business is called its administrative jurisdiction, as opposed to its jurisdiction in contentious business, in which every proceeding has for its main object to decide a dispute between two persons" (Sweet, *Law Dictionary*).

<sup>3</sup> There is an enumeration in the judgment in *Andrews v. Barnes*, 1888, 39 C. D. 140. Such costs have been allowed "in some cases to vindicate the honour and justice of the court."

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fairly, are entitled to their costs out of the estate, as a matter of course; and the same rule extends to personal representatives, to whom, as they can only obtain complete exoneration by having their accounts passed in the court, the court will give every opportunity of exonerating themselves by passing their accounts at the expense of the estate" (ch. xvii. sec. 3). But not only so: "It frequently happens that in actions to which the trustees or personal representatives are parties, . . . and which do not involve any account, they have incurred expenses which it is very right they should be reimbursed, but which do not fall under the denomination of costs of the action, even when directed to be taxed as between solicitor and client. Of this nature are many charges to which where there is a judgment directing an account, a trustee would be considered entitled under the head of just allowances, but which, where there is no judgment for an account, and consequently no opportunity of claiming just allowances, a trustee would be in danger of losing, especially in cases where the action does not involve property out of which they can be retained or disposes of the whole of the trust fund. The court will, therefore, in such cases, upon the statement that such charges have been incurred, extend the order for the taxation of costs as between solicitor and client to the costs, charges, and expenses properly incurred by the trustee. Under such a direction as this, the trustee may obtain all such expenses as he has properly incurred relating to the trust property in or in connection with the action, although they are not properly costs in the cause; and under it he may be allowed the costs of litigation conducted by him strictly as trustee, whether successfully or unsuccessfully, and although he may not have been allowed such costs in the actions in which they have been incurred; and costs properly

incurred by trustees, and paid or payable to their solicitors, will be allowed though statute-barred<sup>1</sup>" (*ibid.*, sec. 4).

A few applications of these principles may be given.<sup>2</sup> A case<sup>3</sup> involving many of the principles, which regulate costs was decided in 1888. A vicar<sup>e</sup> and churchwarden brought an action against the trustees of a small charity fund raised to provide a church-room for the parish, on the ground that the latter held the fund on a condition which could not then be fulfilled. The judge thought the action was an idle proceeding, and ordered the vicar, etc., to pay the trustees' costs, as between solicitor and client, saying, "I think that it is the duty of the court to protect this fund, and, so far as I can, it shall not be burdened with one farthing of this most unjustifiable litigation. . . . I can hardly conceive a more proper case" for such costs, "where the plaintiffs have made an improper attempt to get this trust fund out of the hands of . . . the rightful trustees. If party and party costs only were given, the defendants, as trustees, would be entitled to be paid their extra costs out of this small fund, which I deem it to be my duty to protect to the utmost."

A trustee who was guilty of no misconduct was allowed his costs as between solicitor and client, though it resulted that two sets of such costs were allowed. Where an estate was insufficient, the executor was held in an administration action entitled to his costs, charges, and expenses in priority to everybody else. Where a settlement was set aside, the trustees were allowed their costs out of a fund, though some of the beneficiaries (i.e. those who were to get

<sup>1</sup> i.e. could not be recovered as a debt owing to the lapse of time since they were incurred.

<sup>2</sup> Mostly from the *White Book*, 1921, O. 65, r. 1, pp. 1193, 1289.

<sup>3</sup> *Andrews v. Barnes*, 39 C. D. 133.

something out of it) were not. Where trustees (acting under advice of counsel) made a *bona fide* mistake which rendered an action necessary, they were not ordered to pay the costs of it; and where a trustee denied that he was indebted to an estate, but on taking an account it appeared that he was, he was still allowed his costs. In the latter case,<sup>1</sup> in 1882, a judge said, "It is not the course of the court in modern times to discourage persons from becoming trustees, by inflicting costs upon them if they have done their duty, or even if they have committed an innocent breach of trust. The earlier cases had the effect of frightening wise and honest people from undertaking trusts, and there was a danger of trusts falling into the hands of unscrupulous persons, who might undertake them for the sake of getting something by them."

So, the general costs of an administration action were allowed to a trustee, even though the greater part of his claim for expenses of realisation was disallowed, such claim not being improper, dishonest, or monstrous. Trustees are entitled, on being required to furnish accounts in respect of their trust estate, to demand that they should be guaranteed against the expense of complying with the request.

A trustee, who honestly invested in an improper security, was not mulcted in costs where he made good the deficiency, and would not be where the security proved sufficient.

On the other hand, where a trustee by his own conduct occasioned an action, he was ordered to pay the costs of it, and though he then refunded all the trust money in question, he was not allowed his costs in the proceedings after his refunding. Executors were ordered to pay the costs of an action against them caused by their first withholding

<sup>1</sup> *Turner v. Hancock*, 20 C. D. 305. Lord Selborne, as there cited, had extended this reasoning to mortgagees.

accounts and then giving incorrect ones. A case<sup>1</sup> in 1882 seems to go very far. A tradesman settled property on his wife and children (a "voluntary" settlement). Some time after he became bankrupt, and his creditors endeavoured to get the settled property. In the County Court the trustees of the settlement supported it, but it was set aside. They appealed, and successfully; but finally, on appeal, the County Court judge was held to be right, and this colloquy ensued.

Counsel for the creditors: "I ask for the costs here, and in the first appeal."

Judge: "I think that is reasonable. In the County Court the trustees might fairly say, 'We want a decision about the settlement'; but having had a decision, if they choose to appeal they must take the consequences."

Their Counsel: "Will your lordships order them *personally* to pay the costs?"

Judge: "Of course. The costs here, and in the first appeal; not in the County Court."

Their Counsel: "The County Court judge did not give the trustees of the settlement their costs out of the estate. He left them to pay their own costs. I submit that in a case of this sort they did only what was right in defending the settlement."

Judge: "It is a hard case on the trustees, but on the other hand, you are asking for costs out of other people's property. You ought to have been satisfied with the decision of the County Court. It is a hard case, but the result will be this, that a man will be very slow to accept the trusts of a voluntary settlement."

Here is another instance<sup>2</sup> where a trustee had to pay

<sup>1</sup> *Ex parte Russell*, 19 C. D. 588.

<sup>2</sup> *Re Cabburn*, 46 L. T. 848, in 1882.

costs out of his own pocket. He was a trustee and executor under a will, and brought an action for the administration of a small estate, on the ground that it was in the interest of all parties, as there were doubts about the true construction of the will and difficulties and disagreements with regard to the interpretation of the trusts, and that he needed the protection of the court. Those who were to take under the will suggested a quicker and cheaper (legal) way of settling matters than by his action, and as it was ultimately held that there was no ground whatever for invoking the interference of the court—except on the construction of the will, and that was held not to be in doubt—the trustees had personally to pay the costs, “as the court will not allow itself to be made an instrument or mere agent of oppression, nor interfere where the only result must be to despoil of their property persons unable to protect themselves.”

Where a trustee had allowed costs to be improperly incurred, and retained out of the trust estate, he was ordered to pay the costs of an action brought by “the real owner of the fund.” And so, where a trustee had unreasonably withheld payment of income, and had refused to act on reasonable evidence of identity, he was ordered to pay the costs of proceedings instituted by the person he ought to have paid, “to compel payment.”

A trustee may be honest, and yet from overcaution or some other cause he may act unreasonably, and if his conduct is so unreasonable as to be vexatious, oppressive, or otherwise, wholly unjustifiable, and he thereby causes “the person to whom the trust money belongs” expense which would not otherwise have been incurred, “the trustee must bear the expense,” said a judge in 1895, where a trustee took it into his head, quite wrongly, that a person to whom he had had to pay an income for years was dead, and that



an impostor<sup>1</sup> was drawing the money. So in 1895 a trustee, who unreasonably refused to transfer stock, had to pay the costs of proceedings occasioned by his obstinacy.<sup>2</sup>

All the above illustrations of a system of more liberal allowance of costs (including the solicitor and client scale) have been taken from Chancery cases. This has been done partly in anticipation of what will be said later of the equity courts (p. 227); but it must be pointed out here that in all these instances, and generally in suits before these tribunals, there is a fund under the control of the court, or an estate in question, and that the tendency to award costs more generously than in other courts, perhaps, arises from the fact that, before the fund or the estate is distributed, it belongs to no particular person, and the burden, therefore, does not weigh on any individual. Moreover, if, as commonly happens, the property "in Chancery" is ultimately to be shared by a number of persons, the incidence of costs "out of the estate" is felt lightly by each. At any rate, such a device as "solicitor and client" costs is much rarer in common law courts, though not unknown there, than in those on "the other side." In this respect the practices of these two great divisions of the judicature have been gradually assimilated, for "one of the objects" of certain new rules of January, 1902, was "to meet the complaint of want of uniformity in taxation, and for this purpose it was determined to establish an amalgamated taxing department . . . which should perform all the duties hitherto performed by the Chancery taxing masters on the one hand and the masters of the Supreme Court on the other."<sup>3</sup>

<sup>1</sup> *Re Chapman*, 72 L. T. 66.

<sup>2</sup> 2 Ch. 483.

<sup>3</sup> The Lord Chief Justice, in *Covington v. Metropolitan District Railway*, 1903, 1 K. B. 236.

Another judge stated the policy of these new regulations more explicitly. "It was said that the costs allowed in the King's Bench Division were allowed on a less liberal scale than in the Chancery Division, and it was desirable that both should be assimilated so that the suitors should not have any reason for preferring one division to the other<sup>1</sup>; in short, that all costs should be as nearly as possible an indemnity to the recipient.

### E.—SOLICITORS.

This profession, practically indispensable in all litigation and much other business of importance, is regulated by authority perhaps more than any other. The essential point to notice here is that in the matter of legal costs, a great, indeed, the chief, responsibility rests on them, and that the courts by no means tend to minimise it. When they think it just, they order the solicitor in a case to pay some or all the costs of it out of his own pocket.

The general rule<sup>2</sup> runs thus, "If in any case it shall appear to the court or a judge that costs have been improperly or without any reasonable cause incurred, or that by reason of any undue delay in proceeding under any judgment or order, or of any misconduct or default of the solicitor, any costs properly incurred have nevertheless proved fruitless to the person incurring the same, the court or judge may call on the solicitor of the person by whom such costs have been so incurred, to show cause why such costs should not be disallowed as between the solicitor and his client, and also (if the circumstances of the case shall require) why the solicitor should not repay to his client any costs which the

<sup>1</sup> *In re Ermen*, 1903, 2 Ch. 162.

<sup>2</sup> Rules of the Supreme Court, Order 65, rule 11.

client may have been ordered to pay to any other person, and thereupon may make such order as the justice of the case may require." A few instances may be given. In 1895 the court came to the conclusion that an appeal had been brought entirely at the instigation of the solicitor, and solely to benefit himself (by "putting the screw on" the opposite side to make them come to an arrangement with him about certain costs), and that it was "very nearly, if not quite, justifiable to say that it was a blackmailing appeal," and they ordered the solicitor to pay the costs of appeal to which his client was liable, and prohibited him from getting any costs from her.<sup>1</sup> Where one party had to produce documents, and put in *inter alia* 4216 letters, and charged the other party £19 odd for a copy, the court thought this was an oppressive expense, and ordered that the former should pay all costs occasioned by this proceeding, and repay the £19 (less £2, the proper sum for a copy), hinting<sup>2</sup> plainly that the penalty ought to fall on the solicitor whose business, of course, it was to attend to the matter.

In 1886, a solicitor, whose duty it was to invest £1600, a fund in court (though not on behalf of his own client, but of another party to the suit), omitted to do so. He had to pay the loss of interest thereby caused, and the costs of the proceedings, and would have had to pay the loss on the capital value of the fund, had there been any.<sup>3</sup> "I do not agree," said the judge, "with the contention that the solicitor is not liable except to his own client. . . . He was acting as an officer of the court, and in that character I conceive he was liable to the court for the due discharge of his duty."

<sup>1</sup> *Harbin v. Masterman*, 1896, 1 Ch. 366.

<sup>2</sup> *Hill v. Hart Davis*, 26 C. D. 473, 1884.

<sup>3</sup> *Batten v. Wedgwood Company*, 31 C. D. 346.

In 1894, a judge thought that solicitors had shown discourtesy by not giving notice that their client, a material witness, was too ill to attend, with the result that when the case was called on in its place in the list, it had to be adjourned, and they were ordered to pay such costs as were occasioned by its being set down for that day.<sup>1</sup>

In 1895, a solicitor who showed unreasonable haste in commencing litigation (of an unimportant kind) on behalf of his client, though he won his point, was disallowed his costs against the client.<sup>2</sup>

In 1868, under a will, a lady was left £7000, and a girl baby £500; both sums found their way into court, and both, through the innocent mistake of her solicitor, were ordered to be paid to the lady in 1871. In 1888 the little girl became twenty-one, and wanted her legacy, and the negligent solicitor was ordered to make good to her any deficiency she could not recover from her fellow legatee, and to pay the costs of the proceedings as between solicitor and client.<sup>3</sup> In 1911 a solicitor agreed with a party (whose claim against a bank he must have known to be unfounded) that his only remuneration should be part of the damages he hoped to get: he thought that sooner than fight, the bank would pay something: the agreement with his client was quite illegal; the lady lost and was ordered to pay costs: as she could not, the court ordered him, a would-be "partner," to do so.<sup>4</sup>

It occasionally happens, generally through honest mistake, that solicitors begin litigation without the authority

<sup>1</sup> *Shorter v. Tod-Heatly*, 1894, W. N. 21.

<sup>2</sup> *In re Dartnall*, 1895, 1 Ch. 474.

<sup>3</sup> *In re Dangar's Trusts*, 41 C. D. 178.

<sup>4</sup> *Danzey v. Metropolitan Bank*, 28 T. L. R. 327, 1912. "Many people had said that it is not wrong for a solicitor to take up speculative actions, but no one had said it was laudable."—Darling J.

or consent of the party whom they purport to represent: in such cases they themselves have been made to pay the costs of both sides. Finally, it may be added for the sake of completeness, that the remedy by an action is as much open to a client against a solicitor as to any person against any other, where a legal grievance is alleged. The solicitor, said a judge in 1830, "is liable for the consequences of ignorance or non-observance of the rules of practice of this court; for the want of care in the preparation of the cause for trial, or of attendance thereon with his witnesses; and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession. Whilst, on the other hand, he is not answerable for error in judgment upon points of new occurrence, or of nice or doubtful construction, or of such as are usually intrusted to men in the higher branch of the profession of the law."<sup>1</sup>

The anxiety of the law that suitors should not be burdened with unnecessary costs has also led to the doctrine of

#### F.—SECURITY FOR COSTS.

It constantly happens that persons who sue and lose fail to pay the costs incurred by and due to their opponents. No expedient has been devised to get rid of this injustice, and to this extent, any one of any substance is at the mercy of any man of straw. In a very few cases<sup>2</sup> there is power

<sup>1</sup> *Godefroy v. Dalton*, 6 Bing. 468.

<sup>2</sup> "Obviously frivolous or vexatious, or obviously unsustainable," it was laid down in 1892 (3 Ch. 277). The Vexatious Actions Act, 1896, which provides that persons who have persistently brought unreasonable actions may be restrained from doing so, except by permission of a judge, was passed in view of notorious proceedings by a Mr. Chaffers. Where a civil claim is founded on a *felony* it is practically impossible to proceed with an *action* until the graver question of crime is tried: *Smith v. Selwyn*, 1914 3 K.B. 98. (See p. 244).

to prevent actions proceeding—even then, not without expense to the sued; but, generally, it would be manifestly unjust to stop the hearing of grievances, because the suer is, or is supposed to be, without means to defray costs if he is unsuccessful. But the law does what it can to minimise this injustice, by ordering the suer, in certain classes of cases, to give security for or to deposit a sum of money to cover costs; if he does not he cannot go on. The chief of these classes are: Where he resides abroad, where he has no permanent address, or there is any difficulty in finding him, where he is only nominally the suer, and where limited companies sue and there is reason to believe<sup>1</sup> that they cannot pay if they lose. Moreover, married women without separate estate, insolvents, and persons without visible means are under certain disabilities.

Where the suer lives abroad, it is clear that there might be much additional difficulty and expense in getting costs from him; against that additional difficulty his opponent has a right to be protected. Where that especial danger disappears, the rule disappears, viz. where the suer has substantial property in this country. And for this purpose all the British Isles are one country.

If there is any difficulty in finding a suer, or his movements give rise to the suspicion that, having launched his action, he is evading his liabilities to his opponent, it is only fair that he should be called on to show his *bona fides*.

Persons who sue nominally are generally bankrupts, whose interest has really passed to some one else, say, the creditors, but who can still much more conveniently and cheaply sue in their own name on the other's behalf. As it is certain that they could not pay costs if they lost, it

<sup>1</sup> Companies (Consolidation) Act, 1908, sec. 278.

would be unreasonable that they or those behind them should not give security.

There is, of course, strong "reason to believe" that limited companies in liquidation will not have sufficient assets to pay their costs if they lose, and accordingly they *may* be ordered to give security therefor. Nevertheless, there is a general rule<sup>1</sup> that "the plaintiff will not be compelled to give security for costs merely because he is a pauper or bankrupt or insolvent." Still, there are cases where, for various reasons, insolvents have been made to give such security. And there is a great exception to the general rule in the case of appeals, for "there the appellant has had the benefit of a decision by one of Her Majesty's courts, and so an insolvent party is not excluded from the courts, but only prevented if he cannot find security from dragging his opponent from one court to another."<sup>2</sup> And there are many other grounds on which an *appellant* will be ordered to give security for costs, for the dispute has been threshed out once.

It is, however, the law that any one who sues in the High Court for a "tort," i.e. broadly some grievance other than a breach of contract, e.g. for libel, personal injuries, etc., and cannot satisfy a judge that he has<sup>3</sup> "visible means" of paying the costs if he loses, may be ordered to give "full

<sup>1</sup> See *Cook v. Whellock*, 1890, 24 Q. B. D. 663. The reason for this difference between a company and an individual is probably historical, the former being the creature of modern statutes. "Security for costs," said a judge, "was required in the days when the person of the debtor could be seized, and if the court thought that he was going abroad, so that the defendant could not arrest him, then security was required. When the person of the debtor ceased to be liable to arrest, the incidental remedy ceased also" (*In re Isaac*, 1885, 30 C. D. 420).

<sup>2</sup> *Cowell v. Taylor*, 1885, 31 C. D. 38.

<sup>3</sup> County Courts Act, 1919, sec. 2.

security" for such costs, in default of which, unless the judge thinks the action ought to go on, the proceedings will be stopped—a jurisdiction which seems to be seldom exercised—or the judge may send the case to be tried in a County Court, where the costs are supposed to be less. Here "visible means" signifies "such means as could be fairly ascertained by a reasonable person in the position of defendant. It does not mean merely 'tangible means'; the judge must satisfy himself whether the plaintiff has any means."<sup>1</sup>

A married woman without separate estate or other property is in the same position, if she sues, as any other suer similarly situated, i.e. she cannot be compelled to give security merely because she is or appears to be poor, but, like them, she is subject to the rule just cited. "It is no doubt rather a startling result," said a judge in 1885,— "a married woman who has no separate estate may be engaged in extensive litigation, and involve a defendant in a large amount of costs which the defendant may never be able to recover against her. But, strange though the result may be, the (Married Women's Property) Act (1882) is imperative."<sup>2</sup>

In the County Court security for costs is ordered practically on the same principles as in the High Court, but if the suer does not reside in England or Wales, he must give such security; and if his opponent's residence or place of business is more than twenty miles from the court, and the latter can show on oath "a good defence upon the merits,"<sup>3</sup> the former must give some security. The amount fixed as

<sup>1</sup> *White Book*, 1921, part v., p. 2235, s. 2 of 1919 Act (=s. 166 of 1888 Act).

<sup>2</sup> *In re Isaac*, 30 C. D. 420, 1885.

<sup>3</sup> County Court Rules, Order 12, rule 9.



security naturally depends on the amount of costs reasonably likely to be incurred, and it is generally a substantial part of such amount.

#### G.—POOR PERSONS<sup>1</sup>.

“For many years,” says Mr. Hassard-Short (*The Practice in Poor Persons’ Cases*, ix. 1916), “England was behind the great civilised States<sup>2</sup> of the world in the matter of affording facilities to poor persons for bringing their claims before the courts of law. In 1914 the old Rules . . . were repealed and the new Rules . . . came into operation on” June 9, 1914 . . . . “The new procedure is much simpler for the applicant who now, in place of the affidavit and case for opinion of counsel, only has to fill up a form of application. . . . Under the new Rules any person may be admitted to take or defend or be a party to any legal proceedings in the High Court of Justice or Court of Appeal as a poor person on satisfying the Court that he has reasonable grounds for such proceeding and is not worth £50 (excluding wearing apparel, tools of trade and the subject matter of such proceeding), or under special circumstances such larger sum, not exceeding £100, as a judge personally may direct.” . . . A “poor person” for this purpose is one who does not earn normally or is not in receipt of more than four pounds a week. In matrimonial causes where the wife is the applicant the joint income is taken into account. Counsel and solicitor are assigned; the former in no circumstances gets any remuneration; the latter *may* recover “out-of-pockets” or even full costs from the other

<sup>1</sup> For the old *in forma pauperis* system see 1st edn. of this book, p. 172

<sup>2</sup> Scotland has had a system since 1424.

side; the most his client has to pay is his actual cash disbursements. These Rules are "not for the purpose of giving free advice on any legal matter or for assisting persons to make their wills, discover lost relatives, etc." Apparently County Court judges have the same general power on the same conditions: *Annual County Court Practice*, 1921, pt. 2, c. ii., p. 968. For such relief in criminal cases see p. 293.

Such are some of the chief provisions which the law makes with the view of controlling and keeping down legal expenses. Too much space has perhaps been given to this subject, but of all aspects of our law this is possibly the one that most arrests the popular attention. We have seen (p. 50) that a great judge and thinker thought that one of the worst flaws in our system was its costliness, and that remains much the same as it was in his day. "Your decisions," said Lord Justice Scrutton in 1920, "should be given quickly and they should be given cheaply.<sup>1</sup> If you

<sup>1</sup> A most interesting commentary on this ideal is supplied by Sir Dudley North (brother of Lordkeeper Guilford and of Roger, a barrister in large practice, who wrote his *Life* and tells the story), who was a merchant in Constantinople, 1662-1680: he suggests that in some respects Turkish justice compared favourably with English. "One thing" is "in favour of the Turkish law which is of admirable use, and that is their despatch . . . justice is a rare thing if it may be had; but if it is to be gained by sailing through a sea of delays, repetitions and charges, really it may be as good a bargain to stay at home a loser. A wrong determination, expedite, is better than a right one after ten year's vexation, charge and delay. A good cause immediately lost is, in some respects, gained; for the party hath his time and tranquillity of mind reserved to himself to use as he pleaseth, which is a rare thing in the opinion of those who have felt the want of both, and of their money to boot . . . consequently, wrong judgments soon and final have the virtue of justice, because peace and quietness are thereby preserved. But delays have an effect directly to the contrary; for those maintain feuds and hatred as well as loss of time and money; so that if it

make justice expensive you deny it to the poor man; and the justice of the English Courts should be such that rich or poor should be able to obtain it from the courts without being ruined. . . . Now it is one of the present dangers of English justice that the ability and energy of counsel and the fertility in suggestion of expert witnesses are making justice too expensive for the poor. There is a case at present going on in the House of Lords . . . where a colliery tip on a hillside slid down and two or three thousand pounds worth of damage was done to the houses below and another two thousand or so was spent in stopping the colliery refuse from slipping further. . . . At the present moment . . . the costs on both sides are over £150,000. Now if it had been a poor man's house what justice could he have had with expenses like that? And this is one of the dangers which needs meeting at present in English procedure. It is partly owing to the industry of counsel and partly owing to that particular class of relatives of Ananias to whom I have already referred. It is most extraordinarily expensive to fight any case involving scientific investigation."—*1 Cambridge Law Journal* 9. One reform possible immediately is the abolition of court

be said in the end justice is secured thereby (which I do not grant), I answer, It is done by unjust means and comes to the same." "It is a question whether in experience the ordinary checks by the European laws set up to control this arbitrary power of judging, by numerous forms, dilatories, processes, offices, allegations, and probations without end, to say nothing of errors and appeals . . . are found to have much mended the matter." He does not defend corruption, but explains.—The Judge "accounts something is due to him for doing justice, *not much unlike what is termed fees*, only without state or rule as the European way is." "But in the main, corruption enough, no doubt; and where is it not so? If it is found there that men truckle under the tyranny of the greater, and bear oppression rather than offend them, *here men truckle for fear of the law itself, and let their just right and property go rather than launch into a deluge of officers, counsellors, and forms.*"

fees.<sup>1</sup> They are direct taxes on justice in the sense that they always tend to, and frequently do, prevent persons seeking legal redress by reason of the initial burden "out of pocket." It is true that, were it not for some such check, numbers would rush into litigation merely to harass and annoy those against whom they harboured spite.<sup>2</sup> But it would be quite easy to devise penalties (say extra costs) against such litigants, when their *mala fides* was ultimately demonstrated, and meanwhile, in suspicious cases, to extend the list of those liable to give security for costs. Moreover, it is to be hoped that public opinion would in time frown upon *dishonest* litigiousness as effectually as it does on other forms of *registered* dishonesty. But, in any case, assuming that

<sup>1</sup> E.g. for writ commencing an action, ten shillings; on entering an appearance, two shillings; on setting down appeal or cause for hearing, two pounds. In the County Court, on beginning an action, one shilling in the pound claimed; for every hearing, two shillings in the pound up to £20; e.g. for twenty pounds claimed, the fees before the case would be heard would be three pounds. Poor litigants who have paid the former fee are constantly astonished at the demand for the second—and as they cannot find it, *unable to get a hearing*. It reminds one of Candide's judge at Surinam. "Le juge commença par lui faire payer dix mille piastres pour le bruit qu'il avait fait. Ensuite il l'écouta patiemment, lui promit d'examiner son affaire sitôt que le marchand [the sued] serait revenu et se fit payer dix mille autres piastres pour les frais de l'audience." C. 19.

<sup>2</sup> "It is a fault of cheap justice, as of cheap gin, that it is purchased by many who were better without it" (Mr. Justice Darling, *Scintilla Juris* "Of Courts"). Scott writes in his *Diary*, Dec. 12, 1825: "Was engaged the whole day with Sheriff Court processes. There is something sickening in seeing poor devils drawn into great expenses about trifles by interested attorneys. But too cheap access to litigation has its evils on the other hand for the proneness of the lower classes to gratify spite and revenge in this way would be a dreadful evil were they able to endure the expense. Very few cases come before the Sheriff Court of Selkirkshire that ought to come anywhere. Wretched wranglings about a few pounds begun in spleen, and carried on from obstinacy, and at length from fear of the conclusion to the banquet of ill-humour 'D-n-n of expenses.'"

increased cheapness would multiply groundless or vexatious actions, it is still better that this evil should exist than the greater one of people with genuine grievances being prevented by the exactions of the law itself from appealing to that law. The existence of these charges is not compatible with an ideal administration of justice.

Theoretically, the costs of successful appeals are in the same position as court fees, i.e. they are imposed by the state without the consent of the payer, in the sense that they are caused by some mistake of judge<sup>1</sup> or jury, who are the officers and representatives of the state, and it has therefore been suggested that where an appeal corrects a judge's law or a jury's facts, the (appeal) costs of both parties should be borne by the state, for neither litigant has been unduly pugnacious in coming again. This view is reasonable, provided that there is power to punish a rash or spiteful unsuccessful appellant, besides making him pay the ordinary costs (as he generally has to at present), for he has already had the view of the law on his case; and if he disputes it, he should do so at his risk, and such a power as this is implied in the general judicial power of punishing unnecessary litigation, which has already been contended for as the corollary of cheapening lawsuits.

<sup>1</sup> A judge once cynically said: "The principle upon which costs are not awarded is that a suitor ought not to pay for the errors of a judge." *Denny v. Hancock*, 40 L. J. Ch. 194, in 1870. But for the present rule see p. 142 n.<sup>2</sup>. "I have heard," wrote the great Joshua Williams in 1857, "that in Norway . . . the law is that when the decision of an inferior judge is reversed by a superior court, the judge has to pay out of his own pocket the costs thereby occasioned. Few men, I fear, would be found among us to accept a seat on the Bench on these terms": *Letters to John Bull, Esq.*, in *Lawyers and Law Reform* x. The expense and other inconvenience of two judges differing in an appeal was so great that the rule was adopted of (having three, preferably, or) upholding the one who agreed with the judge below: *Law Journal*, July 11, 1914, p. 420.

## 36. The Law of Evidence

The ideal of the law is that testimony should fulfil three conditions, viz.:—

- i. It must be relevant to the issue.
- ii. It must not be of a worse *kind* so long as a better is available.
- iii. It must be produced in such a form that it can be cross-examined to.

Upon this ideal it insists whenever it is practicable, i.e. compatibly with doing justice, and accordingly in the great bulk of cases these three conditions are fulfilled. They are waived only where the stamp of truth is deemed to be conspicuously impressed on the evidence without them.<sup>1</sup> Perhaps the first is never waived. What is or is not relevant to a story is not a matter of law but of common sense, which sometimes, as we know from daily life, guides different people to different conclusions about the same thing. So, what is relevant in a given case is by no means always easy to determine, as will be seen below (p. 212). What is not relevant may not be given at all, as it wastes time; thus Mrs. Cluppins's<sup>1</sup> observations on a memorable occasion anent her family, existent and prospective, were cut short.

Condition ii. does not imply that the law will interfere with or discriminate among the materials at a party's disposal, that, e.g. where a number of witnesses saw an act done, it will dictate that one of these shall be called in preference to another, as likely to be more trustworthy;

<sup>1</sup> E.g. where the other side accepts evidence or does not demand cross-examination. In urgent cases one side is necessarily heard before the other and a *temporary* decision given.

<sup>2</sup> *Pickwick*, ch. 34.

or where expert opinion is wanted—say a doctor's—it will say, "You may call Mr. A. but not Mr. B., because he is more eminent in his profession"—but only that if a party wants to establish that somebody saw something he must (if reasonably possible) produce that person in court to say so; no amount of writing by that person, even under oath, will do; or if it is to a litigant's interest to show what is the true scientific view of his conduct or of anything else, he must produce the appropriate trained expert, and equally must call him. If it is desired to use a letter, it must be produced, and the writer may have to be there to swear that he wrote it. This is the principle of the "best evidence."

It is obvious that if this principle did not prevail, much said and done behind a man's back would be evidence against him, when he was a party, and much would be purposely said and done behind his back—i.e. manufactured—if it was not to be tested in his presence. Hence condition iii. follows necessarily from ii.; cross-examination is such a test. It is only dispensed with where no test is supposed to be required (see pp. 201, 211, 213, and cf. n. 86).

But "where you cannot get the best possible evidence, you must take the next best," said a judge<sup>1</sup> in 1840, where the books of the Bank of England, not being allowed on the ground of the public convenience to be removed to the court, the next best thing practicable was to prove that an entry in them was in the handwriting of a certain person. The judge remembered a case where a man had written a libel on a wall—of course, a copy was allowed, the wall was not bodily produced; so if a letter is proved to be destroyed or lost, its contents may be given from a copy or from memory, if the original could have been given.

<sup>1</sup> *Mortimer v. M'Callan*, 6 M. & W. 69.

(See, for instance, p. 214.) These instances illustrate what is "reasonably possible."

### 37. Hearsay

The most important exclusion under these general rules is that of "hearsay"; it supplies, too, the most important exception to those rules.

The golden rule here is, "Hearsay is not evidence." Perhaps its most classical expression in English is, "You must not tell us what the soldier . . . said." Put less epigrammatically, the rule is that a witness may only depose what is within his own knowledge; the psychological difficulties which might arise—what knowledge is—cannot be touched here. By far the commonest application of the rule is the prohibition of a witness's telling what somebody had told him or her, about a material point when the person against whom that statement is offered was not present.

If he was present, the case will be altered as will be seen. A. (in the box) may not say what B. told him about C. (a party), for the truth of what B. told him is not within his personal knowledge. It is within it that B. made a statement to him, and this he may say. The rule is obviously artificial, for in daily life<sup>1</sup> we constantly rely upon hearsay—very

<sup>1</sup> "It seems a pity that what is called 'hearsay evidence' is not allowed to be given in our courts for what it is worth; for though it may be freely admitted that what a man hears said of him, without denying it, may be assumed to be true, it is none the less likely that a good deal more truth will be spoken of him when he is away than when he is present to be offended at the candour of his friends, and, possibly, to vigorously resent it. And though I am not prepared to say with 'the Jacobin,' 'Whatever is, in France is right,' yet there is much more to be said for gossip than that the French courts attend to it" (Mr. Justice Darling, *Scintillæ Juris*: "Of Evidence").



frequently, though not always, with profit. Thus, if we are seeking certain information, we are constantly told, "Personally, I don't know, but so and so told me," the very point we are asking about it; and we often act on such evidence with perfect safety. But, on the other hand, we are sometimes misled by such talk; our narrator has not heard, or has forgotten some qualifying word or phrase, or has put a sentence into the mouth of one person which was said by another—which might make all the difference to us—or even has invented the whole incident. Now, the law is much more afraid of the evils which might, and certainly would, result from such liberty of speech than of those which may and do from its restriction. Take a simple case. It is constantly of vital importance to an individual to prove that he was not at a certain place at a certain time. It is known that a perfectly reputable person, who cannot for some reason be produced in court—perhaps he is dead—said, in the hearing of other respectable persons, who can be produced—in connection with some matter totally different to that under investigation—that he had seen and talked with that individual at that time in that place. Everybody knows that such evidence is conclusive on the particular point. Yet the law must assume that, in every case it has to deal with, the matter is so serious that only the highest possible standard of truth—that is, a scientific standard, by which the utmost certainty attainable is reached—should be applied, and as this standard in some matters, if justice is to be done, would exclude hearsay, it must exclude it in all. The reason why, at any rate, it would *sometimes* not be safe to admit it is thus explained by an eminent authority.<sup>1</sup> "The term 'hearsay' is used with reference to what is *done* or

<sup>1</sup> Taylor on *Evidence*, sec. 570, 11th edit. (1920).

*written*, as well as to what is spoken, and in its legal sense is that kind of evidence which does not derive its value solely from the credit given to the witness himself, but which rests also, in part, on the veracity and competence of some other person. That this species of evidence is not given upon oath, that it cannot be tested by cross-examination, and that in many cases it supposes some better testimony, which might be adduced in the particular case, are not the sole grounds for its exclusion. Its tendency to protract legal investigations to an embarrassing and dangerous length, its intrinsic weakness, its incompetency to satisfy the mind about the existence of the fact, and the frauds which may be practised with impunity under its cover combine to support its exclusion."

The absence of the person<sup>1</sup> against whom the statement is offered, was mentioned above as a condition necessary to exclude hearsay. If made in his presence it may, if not denied, amount to an admission (p. 193), and be reported; and although this combination does not often occur, viz. that a statement adverse to somebody is made in his presence, and that of another, and that the maker does not appear at the trial—for such a person can generally be produced—yet when it does occur, it may be, especially in criminal proceedings, where the law of evidence is very nearly the same, so momentous to the person against whom the statement is offered, i.e. the accused, that this particular exception to the rule against hearsay may be illustrated.

In 1897 X. was charged with an offence for which, if

<sup>1</sup> Perhaps the true phrase is, "Not in the hearing of the person," for a statement may be heard and the maker not seen, as happened in *Neile v. Jakle*, 2 C. & K. 709, in 1849. Cf. *Gray's case*, *Irish Circuit Reports*, 76 (1841), where the accused took no part in a conversation, though he might have heard it: evidence rejected.

convicted, he would be liable to penal servitude for life. A girl who alone (besides X.) knew whether he was guilty or not, was very ill in bed. In the presence of her mother and sister, an inspector of police took a statement from her about 4 p.m., and afterwards put it into writing. At 11 p.m. the same day he returned with X., and in his presence put certain questions to her, and then and there wrote down her answers, on hearing which X. said, "That is not true." The girl died an hour or so afterwards. At the trial it was proposed to put in those questions and answers—the first statement, of course, was out of the question—but the judge (the late Lord Brampton) would not allow this. He denied that—as was then argued—*any* statement made in the presence of an accused is evidence against him. "The statement," he went on, "if made in his absence would clearly not be evidence against him of the facts contained in it. It makes no difference that it was made in his presence, unless evidence could be adduced which would justify the jury in finding that the prisoner, having heard the statement and *having the opportunity of explaining or denying it, and the occasion being one on which he might reasonably be expected to make some observation, explanation, or denial, by his silence, his conduct or demeanour or by the character of any observations or explanations he thought fit to make, substantially admitted the truth of the whole or some portion of it.*" He did not agree that such a statement was admissible if the accused clearly dissented from it. "How can a simple emphatic and distinct denial be turned into an admission of the truth of the contents of a statement not otherwise admissible? To allow such a statement to be put in evidence, even though accompanied by evidence of the prisoner's denial of it, could not fail to be most unfairly prejudicial to him; for when once read

as evidence, it would be extremely difficult, if not impossible, to prevent it from making an impression hostile to the prisoner upon the minds of an ordinary jury. The death of the girl makes not the slightest difference." And in directing an acquittal, he said to the jury, "The objection to the evidence is not a mere technical one, and the view I have taken must, I think, commend itself to you and to all fair-minded persons. I will illustrate it very simply: If a man went into another's presence, and addressing him, said, "On such and such a day you robbed me of my purse and money." And the person so accused said, "Pray do not remind me of it any more. Forgive me, I am sorry," that would be clear evidence from which a jury might well draw their inference that the accused admitted his guilt. On the other hand, if the accused replied, "This is an outrageously false and wicked accusation," no man in his senses could honestly construe that into an admission that he had committed the crime imputed to him."<sup>1</sup> Observe the rule against which the proposed evidence would have offended, is that evidence should be subject to cross-examination. It was not a "dying declaration," as will be seen (p. 210). Of course, if the girl had lived she could have sworn in court all she said in answer to the questions. (But it is now settled that though such a statement is no evidence of the facts stated against the accused (as the jury must be impressively told), yet it is *not* inadmissible merely because he denies it at the moment.<sup>2</sup>)

<sup>1</sup> *Reg. v. Smith*, 18 Cox C. C. 470. On a trial for murder a deathbed confession of the murder was held inadmissible. *S. Gray's case*, *Irish Circuit Reports*, 76 (1841).

<sup>2</sup> The point is too technical to pursue here; the student of *Evidence* will do well to read *Christie's case* in the H. L.: 10 *Crim. App. R.*, 141, 1914. *Smith's case* represented an extreme view from which there has been a recoil.

## 38. Admissions and Confessions

The exception from the general rules just exemplified is in the first of the "three main classes" into which an authority<sup>1</sup> divides these exceptions, viz. (1) Admissions: statements made in the presence of a party, and confessions; (2) statements made by persons since deceased; and (3) statements contained in public documents. All alike are justified by common sense, though, perhaps, not equally.

An admission and a confession have this in common—they are against some interest, from a material (though not, perhaps, from a moral) point of view, of the utterer, and they may, therefore, be safely let in against him,<sup>2</sup> though, of course, neither is conclusive, and it is quite open to him to prove that he lied or was drunk or misunderstood the facts when he made it. If these be cases of hearsay, it is, at any rate, one of the parties himself who has been heard to say whatever it is, and he has himself to blame if he suffers through it. "Admission" is used much more often in civil than in criminal<sup>3</sup> cases, to which the ordinary word "confession" is confined.

<sup>1</sup> Phipson on *Evidence*, ch. xviii. (1921).

<sup>2</sup> A good illustration of this is a wife's admission of misconduct, which may be conclusive against her, but is not against any man she may thereby incriminate, and *vice versa*. The practical effect, however, is that the jury, if there is one, hears the charge against the other party, and may be influenced by it. In one extraordinary case they convicted and gave damages against a co-respondent chiefly, but not entirely, on the alleged confession of the wife (admitted only against her), who did not appear in the suit. But the judge ultimately refused to give the husband a divorce, after hearing the wife (*Long v. Long*, 15 P.D. 218, in 1890).

<sup>3</sup> Where no admission is allowed, i.e. no statement can be agreed upon by the two sides without strict proof, however, trivial the matter; the greatest admission of all, viz. a plea of guilty, must perforce be accepted. But there is ample safeguard that such a plea, if falsely made (as sometimes happens, see p. 194), is not accepted: p. 288.

A simple example of the rule on admissions is if A. sues B. for the price of goods sold, A.'s books debiting B. therewith alone prove nothing—for such evidence is easily manufactured; but if, when the books are produced, A. is seen to have debited C., it is strong evidence that B. is not liable, or if it appears from B.'s books that he admitted the debt, the reverse.

Confessions, too, only operate against the maker—not against any one whom he may implicate.<sup>1</sup> A confession may or may not be in law sufficient to convict the maker; in effect, it never does so without corroboration. False confessions are, of course, rare, but they form so curious a revelation of the human mind that, perhaps, a few words may be devoted to them. "The prisoner," says Taylor,<sup>2</sup> "oppressed by the calamity of his situation, may have been induced by motives of hope or fear to make an untrue

<sup>1</sup> Accordingly, when a fellow-accused is implicated, when the confession is repeated in open court, the name of that person is suppressed (and sometimes that of any other person implicated). That, however, was not allowed in a very remarkable trial, in 1830, of one Clewes, for the murder of one Hemmings in 1806. Hemmings had undoubtedly murdered the Rev. Mr. Parker in 1806, and it was suggested that Clewes and two others accused with him had employed him to do so, and had then murdered him to prevent his giving them up. His remains were not found till 1829. Clewes made a certain confession in prison. The judge at the trial admitted this, but when the clerk, in reading it, suppressed the names of the other two prisoners in it, the judge insisted that they should be read out, and told the jury to disregard anything said about the other two (they were not, as a matter of fact, being tried). The confession merely stated that Clewes was present at the murder of Hemmings, but took no part in it, and knew nothing of the design, and he was acquitted, whereupon the charge against the other two was withdrawn. A commentator says that the practice had been to omit such names, "and some judges have even directed witnesses who came to prove verbal declarations to omit" such names (*R. v. Clewes*, 4 C. & P. 225). The latter is surely the better practice. Even arguments on *facts* which are objected to as evidence are sometimes kept from juries, (*R. v. Winslow*, 8 Cox C. C. 398, in 1860)—now more frequently.

<sup>2</sup> *Evidence*, 11th edit., sec. 863.

confession, and the same result may have arisen from a morbid ambition to obtain an infamous notoriety (Note. One or other of these motives probably induced Hubert falsely to confess that he set fire to London in 1666), from an insane or criminal desire to be rid of life, from a reasonable wish to break off old connexions and to commence a new career, from an almost pardonable anxiety to screen a relative or a comrade, or even from the delusion of an overwrought<sup>1</sup> or fantastic imagination. (Note. This is probably the true key to the frequent confessions of the poor wretches who in old times were wont to be tried for witchcraft.)” Sensational utterances such as those alluded to in this passage have long been the themes of romance, but, perhaps, even fiction has not produced a more extraordinary case than that cited by the writer just quoted in this connection. It is briefly transcribed here as justifying the main rules governing the receipt of confessions, shortly to be mentioned.

In 1819 the Supreme Court of Vermont convicted and sentenced to death two brothers named Boorn for the murder of their brother-in-law in 1812. They were suspected at the time, but they were not tried till one of the neighbours “repeatedly dreamed of the murder with great minuteness of circumstance.” They “deliberately” confessed the murder, and admitted that they had concealed the body where certain articles belonging to their brother-in-law and some bones had been found, and they petitioned

<sup>1</sup> To this head, probably, may be put an extraordinary case in 1858, where, throughout her diaries, a wife suggested improprieties with one person, and, perhaps, with two persons; on the strength of which her husband got a decree of divorce (*a mensa et thoro*) from an ecclesiastical court, but failed to get a dissolution of the marriage from the divorce court, as both these persons satisfied the court that the implicating entries were the result of a delusion (*R. v. R.*, 1 Sw. & Tr. 362).

the Legislature to commute their sentence to imprisonment for life, and this was granted for one. "The confession being now withdrawn and contradicted, and a reward offered for the discovery of the missing man, he was found in New Jersey, and returned home in time to prevent the execution. He had fled for fear that they would kill him. The bones were those of some animal. They had been advised by some misjudging friends that as they would certainly be convicted upon the circumstances proved, *their only chance of life, by commutation of punishment, depended upon their making a penitential confession, and thereupon obtaining a recommendation to mercy.*"

Here, then, is a clear instance where the inducement to confess was the hope<sup>1</sup> of coming off better than if a denial were persisted in. Accordingly, the first general rule is that confessions must be voluntary before they can be used; the second is that they are not held to be voluntary if any inducement to self-accusation has been held out by any one in authority.

<sup>1</sup> This state of things is by no means unknown in minor matters. People sometimes submit to fines, and even imprisonment, rather than run the risk of a severe sentence after defending. It is essentially the same feeling which sometimes prompts people to satisfy a claim they think unjust, rather than be at the trouble and expense of resisting it. It "pays" better. It must be remembered that it is morally wrong to set up an untrue defence; and, therefore, such a course sometimes aggravates the offence—"sometimes," because it is not always possible to say beforehand whether a moral offence is a legal one too. It may be doubtful whether the facts come within an Act of Parliament, as, for instance, in the many cases where embezzlers have been held to be not clerks or servants, and so not within the statute under which alone they could be convicted. Such a state of things, by the way, shows the absurdity of condemning counsel for defending accused persons whom (as it is put) "they know to be guilty." Accused persons, no doubt, who know they have done wrong, often admit their guilt, but they mean moral guilt. If they are not legally guilty as well, it is not only not dishonourable, it is a positive duty to advise them to plead not guilty. (Cf. p. 289 n.).



These principles have been well worked out, and in course of time have become technical and even artificial.

A writer,<sup>1</sup> already cited, has collected the following instances of persons in such authority: "A constable or other officer having the accused in custody (or in cases of felony, perhaps a private person arresting); the prosecutor or his wife; or partner's wife, if the offence concerns a partnership; or his attorney; the master or mistress of the prisoner, if the offence has been committed against the person or property of either, but otherwise not; a magistrate, whether acting in the case or not; the magistrate's clerk; a coroner." How technical this doctrine has become may be seen in two cases contrasted by the same writer.<sup>2</sup>

"A maidservant being charged with concealing the birth of her child, makes a confession in consequence of an inducement held out by her mistress; the confession is admissible, for the mistress is not a person in authority, the offence having no connection with the management of the house (1852)."

"A maidservant being charged with setting fire to her master's house, makes a confession in consequence of an inducement held out by her mistress; the confession is inadmissible, for the mistress is a person in authority, the offence relating to her husband's property (1836)."

In the former case, the mistress said, "You had better speak the truth," and in the latter, "Mary, my girl, if you are guilty, do confess; it will perhaps save your neck. You will have to go to prison if W. H." (whom Mary had charged with the crime) "is found clear—the guilt will fall on you. . . . Pray tell me if you did it." The test being whether the inducement is likely to influence the accused (to make a false confession), it is difficult for an unlearned person to see the difference between these two cases. As if a

<sup>1</sup> Phipson, ch. xxi. (1921).

<sup>2</sup> *Ibid.*

servant girl was more likely to tell her mistress the truth because neither she nor her husband was prosecuting her, and was not likely to, though someone else was; or, as if the confessor generally could weigh the amount of authority at the moment of confession!

Next, on the nature of the promise or threat inducing the confession, the same writer has collected the following instances where confessions were not excluded: those "obtained by inducement relating to some collateral matter unconnected with the charge; or by moral or religious exhortation (whether by a chaplain or others); or by a promise of secrecy; or even by false representations made to, or deceptions practised upon," the accused; ". . . or by his having been made drunk<sup>1</sup> for the purpose; or by questions which he need not have answered, having been put to him by a private person, or by the police before arrest . . . even though put to enable them to determine whether or not to arrest; and the better opinion is that confessions made in answer to questions by the police put to the accused even when in custody, are in strict law admissible, provided there was no promise or threat used. Such questions, however, as well as statements by fellow-prisoners read over to the accused to induce him to confess are to be condemned, and judges, it seems, have a discretion to exclude evidence so obtained."

The importance of this last point, and the true philosophy of the whole subject, are appreciated in the following paragraphs.<sup>2</sup> "As the authority possessed by the persons who make or sanction the inducement is calculated both to animate the prisoner's hopes of favour, on the one hand,

<sup>1</sup> But, in 1839, a confession made by a man while talking in his sleep was rejected. Taylor, sec. 881 n.

<sup>2</sup> Taylor, secs. 874, 876.

and on the other, to inspire him with awe, . . . the law assumes the possibility, if not the probability, of his making an untrue admission, and, consequently, withdraws from the consideration of the jury any declaration of guilt which the prisoner, in these circumstances, may be induced to make. Moreover—and this is a more sensible reason for the rule—the admission of such evidence would naturally lead the inferior agents of the police, while seeking to obtain a character for activity and zeal, to harass and oppress unfortunate prisoners, in the hope of wringing from them a reluctant confession. . . . It by no means follows that the same rule,” about inducements offered by persons in authority,<sup>1</sup> “will equally apply to all promises and threats held out by private persons. These last inducements may vary in their effect to almost any conceivable extent. They will often be obviously insufficient to produce the slightest influence on even the feeblest mind; and, in such cases, the confession which follows, but which, in fact, is not *consequent* on them, should be admitted in evidence. On the other hand, an inducement held out by a private individual may be, and, indeed, frequently is, quite as much calculated to cause the prisoner to utter an untrue statement, as any promise made to him by a person in authority; in these cases it is difficult to see why the confession made to such private person should not be excluded.” It has therefore been suggested that, without laying down any positive rule, whether of admission or rejection, the judge should determine each case on its merits, bearing in mind that his duty is to reject such

<sup>1</sup>In *R. v. Clewes* (p. 194 n.) a magistrate and clergyman had promised the accused that if he confessed he would use his influence with the Home Secretary to procure a pardon; but he told Clewes that that pardon had definitely been refused. The confession made after this refusal was therefore admitted.

confessions only as would seem to have been wrung from the accused under the supposition that it would be *best* for him to admit that he was guilty of an offence. Perhaps the true test is, Was the confession *really* voluntary?

A few instances<sup>1</sup> may be given of inducements to confessions. Evidence held admissible: A promise to give the accused a glass of spirits; to strike off his handcuffs; to let him see his wife. The following words as being merely admonitions: "Be sure to tell the truth"; "I should advise you to answer truthfully, so that if you have committed a fault you may not add to it by saying what is untrue"; "You had better, as good boys, tell the truth"; "I hope you will tell, because Mrs. G. can ill afford to lose the money"; "Don't run your soul into more sin, but tell the truth." The following as neither threats nor promises, only cautions: "I must know more about it"; "Now is the time to take it," i.e. what was stolen, "back to her"; "You would not have told so many lies if you had not done it." "What you say will be used as evidence against you"; "You are in the presence of two police officers; I should advise that to any questions put to you, you will answer truthfully. . . . Take care, we know more than you think we know." "Why have you done such a senseless act?"

Evidence held inadmissible: "It is no use to deny it, for there are the man and boy who will swear they saw you do it." "I dare say you had a hand in it; you may as well tell me all about it." "It will be a right thing for him (accused) to make a clean breast of it." "The inspector tells me you are making house-breaking implements. If that is so, you had better tell the truth." "It would have been better if you had told at first." "You had better tell me about the corn that is gone." "If you tell

<sup>1</sup> Phipson, ch. xxi. (1921).

me where my goods are, I will be favourable to you." A servant in custody said, "If you will forgive me, I will tell the truth"; Mistress replies, "Anne, did you do it? If you don't tell me you may get yourself into trouble, and it will be the worse for you." "I only want my money, if you give me that you may go to the devil." "If I tell the truth, shall I be hung?" "No, nonsense; you will not be hung." "If you don't tell me I will send for a constable." "I shall be obliged if you would tell me what you know about it; if you will not, of course we can do nothing for you." "This is a serious charge—take care that you do not say anything to injure yourself; but if you say anything in your defence, we are willing to hear it, and to send to any person to assist you."

It must be remembered that the party hit, by an admission or confession, is there to explain the circumstances, and to cross-examine or to contradict the reporters.

### 39. Statements by Deceased Persons

The next class of admissible hearsay consists of the statements of deceased persons—such, that is, as are made<sup>1</sup> in such circumstances that they are extremely unlikely to be false (and, therefore, not needing the test of cross-examination). Foremost among these is a declaration made against the maker's own (pecuniary) interest, on the same grounds as those on which we saw that a man's admissions were accepted against himself (though note that here the dead person's utterance may be used against someone else). Thus, where<sup>2</sup> a solicitor entered in his books that he was paid so much for drawing a will and seeing it executed, it was pretty conclusive after his death that such

<sup>1</sup> Taylor, sec. 668.    <sup>2</sup> *Re Thomas*, 41 L. J. P. & M. 32, in 1871.

a document had existed, for there is a high probability that a man does not put down as paid to him a debt which is not paid. Of course, if fraud could be proved, such a presumption is got rid of.<sup>1</sup> In this instance, it having been thus shown that a will had existed, what purported to be a draft of it was, in its absence, accepted.

An interesting case,<sup>2</sup> illustrating more than one principle of hearsay evidence, was tried in 1886. In 1801 George Clapperton was baptized and registered at Aston as the (third) son of John Clapperton and Maria his wife (and was so inscribed in the family Bible). He was very much befriended by one Pemberton, a Birmingham jeweller, took the name of Perton, and died a childless widower in 1881 leaving £200,000 undisposed of by will. This was claimed by the sole-surviving grandchild of the Clappertons as next-of-kin, and by the Crown on the ground that Mr. Perton was an illegitimate child—who in law has no kin through his parents—of the said Pemberton. The Crown was allowed to show that the deceased had himself stated that such was his parentage, and notably, that he had volunteered on one occasion to pay, and had paid ten per cent. duty instead of three on a legacy left him by Pemberton's brother, explaining that the latter was not legally his uncle, as was generally supposed, for he was a *natural* son of Pemberton, and it was proved that for many years he recognised that there was a "mystery" about his birth. Moreover, the other claimant, a granddaughter of the Clappertons, had admitted in the negotiations that the family tradition was that he was illegitimate, and had

<sup>1</sup> "Cases have been known where a declaration against pecuniary interest has been made with a sinister purpose," said the judge, in *re Perton*, 53 L. T. 706, in 1886.

<sup>2</sup> *Ibid.*

produced a family pedigree in which he so figured, his father being stated to be T. Pemberton and his mother being described as the widow of John Clapperton.

Leaving aside for the moment the general exception of hearsay *family* evidence about that family's pedigree, here was clearly the case of a declaration against interest, not only to the extent of the seven per cent., but because, as the judge put it, "to my mind, every man has a strong *prima facie* interest in maintaining his own legitimacy—of avoiding that kind of shame which society attaches to a man, more or less justly or unjustly, because he is illegitimate. Cases no doubt have occurred in which a man has preferred to be thought the illegitimate son of a profligate nobleman rather than the son of an honest tradesman." (But note that the interest must be pecuniary or proprietary.) Again, the claimant could not prove that John Clapperton was alive after 1799, i.e. she could not show that he was alive at the time George Perton was begotten, and the law would not presume that because he was alive in 1799, therefore he was alive nine months before the birth of George. (But if she could have proved that, then the Crown would have to show *positively* that George was illegitimate.) Further, the admissions she had made during the negotiations were evidence against her, because, as we shall see, such evidence on such a question could be put indirectly. Finally, the Crown put indirect evidence by witnesses that the general reputation at the boy's school and factory had been that he was a bastard—testimony, again, admitted in this kind of case. On the whole, the judge had no hesitation in pronouncing illegitimacy and awarding the money to the Crown.

So strong is the presumption that declarations against pecuniary (or proprietary) interest are true, that they draw

with them, so to say, all the rest of their contents. Thus in a famous case<sup>1</sup> in 1808, where the title to great estates depended on what day in April, 1768, a certain person had been born, "an entry" (to quote, for brevity, Mr. Phipson's summary<sup>2</sup> of the facts) "by a deceased accoucheur of the payment of his charges for attending a confinement is evidence of the fact and date (if any) of the child's birth, of the name of its parents, though only stated on hearsay, and of the payment of the declarant's charges, though the payer was alive and might have been called." That this rule, too, has become technical, may be gathered from this passage from the same authority—<sup>3</sup>

"To prove that certain shares belonged to A., an entry in the day-book of a deceased stockbroker—'Bought for A. 200 L. C. Co.'s shares, £1400'—held not admissible as a declaration against the broker's interest: for if the price fell, and he was not bound to deliver any specific shares, the transaction might be for his advantage. (A corresponding entry in the broker's ledger in which the latter, in addition, debited himself with the purchase-money received from A. was admitted.)"

Another class of receivable statements by deceased persons consists of those made as a matter of duty in the ordinary course of business, that is, generally at or near the time of the fact they state, e.g. where a deceased drayman had delivered some beer and the same night made, as was his duty, an entry of the fact in the proper book, this entry was admitted as evidence in an action for the price of the beer.<sup>4</sup> There is a "presumption of truth which arises from the mechanical and generally disinterested

<sup>1</sup> *Higham v. Ridgway*, 10 East, 109.

<sup>2</sup> *Evidence*, ch. xxiii. (1921).

<sup>3</sup> *Ibid.*

<sup>4</sup> *Price v. Lord Torrington*, 1 Salk. 285, in 1703.



nature of entries made *in the ordinary course of duty*, and from their constant liability, if false, to be detected by the declarant's superiors."<sup>1</sup> But note that it is only the exact facts which it is the duty to declare are proved, and these must be within the maker's personal knowledge. Thus, in a coal-mine, it was the regular course for Harvey to give notice to Yem, the foreman, of the coal which was sold. The latter was not present when the coal was delivered to the customers, and could not write, but got Baldwin every night to make the entries from what he told him, and to read them over to him. When both Harvey and Yem were dead, someone was sued for coal, and it was proposed to produce Yem's book to show there was no entry of payment. But this was not allowed, for Yem had no personal knowledge whether the coal was delivered or not, and the claim<sup>2</sup> was defeated. So in 1889, when it was sought<sup>3</sup> to prove a marriage because in a registry of baptisms kept by a curate since dead, he had stated that he had baptized a child in 1804, the daughter of "J. H. and H. F., his wife," and it was his duty to mention whether the child was legitimate or not, the entry was rejected because it was not made at or about the time of the alleged marriage, and because there was nothing to show that the curate knew of his own knowledge there had been a marriage.<sup>4</sup>

<sup>1</sup> Phipson, ch. xxiv. (1921).

<sup>2</sup> *Brain v. Preece*, 11 M. & W. 773, in 1843.

<sup>3</sup> *Ryan v. Ring*, 25 L. R. Ir. 184.

<sup>4</sup> In view of this strictness—limiting the evidence *exactly* to the facts which it was the duty to state, and admitting nothing more—the greater favour shown to statements against interest (pp. 201, 204) seems anomalous. It is, no doubt, reasonable to believe that the accoucheur in 1768 got his fee, but he had no interest, and certainly no duty, in giving the correct dates. But it was the duty of the coal-foreman and the curate to make correct entries respectively of the payments for the coals and of the fact of marriage (and in their cases their actual knowledge was probably as good as

(Of course, the entry was good to prove the baptism.) It is, perhaps, needless to add that there must have been no motive to misrepresent on the part of the dead declarant, e.g. the drayman and the coal-foreman (above) were not alleged to have appropriated the goods, and to have then made the false entries; if they had, such entries would have been mere forgeries.

We may pass rapidly over similar declarations relating to public or general rights. These generally affect titles to rights in land, and notably boundaries. Such evidence is admitted partly from<sup>1</sup> "necessity, ancient facts being generally incapable of direct proof," and partly from "the guarantee of truth afforded by the *public nature of the rights* which tends to preclude individual bias, and lessen the danger of misstatements by exposing them to constant contradiction." But it is an essential condition of such admission that the declaration must be made before the litigation began; otherwise, obviously, such evidence could be manufactured.

We have already (p. 202) had an instance of the importance of admitting statements of deceased relatives in what may be called "family matters," or, generally, "pedigree." As our authority<sup>2</sup> points out, the grounds for

that of the man-midwife in his). The extent to which this rule has been carried may be seen from the following case: In 1831, it became important to decide whether a man had committed an act of bankruptcy under the then law, and this depended on whether he had been arrested in 1825 at his place in Paddington or in South Molton Street. He produced the official return of the officer (now dead) who arrested him, to the sheriff, and this stated distinctly that he had been taken at South Molton Street. But it was not allowed to be evidence, because it was no part of the officer's duty in his return to state the place of arrest, though he was bound to make the return (*Chambers v. Bernasconi*, 1 C. M. & R. 347). It is not surprising that this "stringent application" of the rule "has been frequently criticised" (Phipson, ch. xxiv.).

<sup>1</sup> Phipson, ch. xxv.

<sup>2</sup> *Ibid.*, ch. xxvi.

this are "*necessity*, such inquiries generally involving remote facts of family history known to but few, and incapable of direct proof: and the *peculiar means of knowledge, and absence of interest to misrepresent* of the declarants—members of the family having the greatest interest in seeking, the best opportunities of obtaining, and the least motives for falsifying information on such subjects." The point comes up almost invariably on a question of succession to property or a title, where the relationship or legitimacy<sup>1</sup> of given individuals is of cardinal importance. A good instance, and one illustrating the fineness of some of the distinctions made on this subject, is supplied by the Sussex Peerage Case in 1844 (11 C. & F. 85). The Duke of Sussex, sixth son of George III., had purported to marry Lady Augusta Murray at Rome in 1793. A clergyman of the Church of England had officiated "in a form as nearly as could be according to the rites of the Church of England, an English Prayer Book being used." Their son after their death (unsuccessfully) claimed the peerage; the question was whether the marriage was valid by English law. An entry in a Prayer Book, proved to be in his mother's writing, was admitted; it ran: "The Prayer Book by which I was married at Rome to Prince Augustus Frederick," etc. The Lord Chancellor said, "It is admissible as a declaration by one of the parties that there was a marriage, though not admissible to prove the marriage." The nature of the volume had nothing to do with the matter (p. 209).

Here, too, the statement must be made before controversy has begun for the same reason as before.

It is obvious that there are many family matters of which one cannot have personal knowledge, but yet

<sup>1</sup> Note that in law an illegitimate child can have no family (except one he founds).

about which one cannot be mistaken, e.g. one's own age or the maiden name of one's mother or grandmother. When it becomes important to establish such a point it often could not be done without trusting to a family tradition, "since most family information is obtained at second-hand," and it would "frustrate"<sup>1</sup> "the main object of relaxing the hearsay rule" to insist on first-hand knowledge. "It is sufficient, consequently, if" the "information purported to have been derived from other relatives, or from general family repute, or even simply from what" a declarant "has heard," provided such "hearsay upon hearsay" does not directly appear to have been derived from strangers. . . . Statements about matters occurring six generations before have been received." Thus on a question of pedigree to prove which was the eldest of three sons born at one birth, a declaration by their deceased father that he had for the purposes of distinction christened them Stephanas, Fortunatus, and Achaicus, according to the order of names in St. Paul's first Epistle to the Corinthians; and a declaration by their deceased aunt that she had for the same purpose tied strings round the arms of the second and third children at their birth are admissible" (Phipson, ch. xxvi. of a case in 1731). With regard to the extent of distance back *Davies v. Lowndes* (7 Scott N. R. 711, in 1835-43) is interesting. The title to large estates under a will in 1768 was at stake, and it was sought to put in evidence a Welsh pedigree tracing the genealogy of the family from the Lord of Rhys, Prince of South Wales, who died in 1233, to a William Lloyd living in 1733. At its foot was the memorandum: "Collected from parish registers, wills, monumental inscriptions, family records, and history: this account is now presented as correct, and as confirming

<sup>1</sup> Phipson, ch. xxvi.

the tradition handed down from one generation to another to Thomas Lloyd . . . of Cwm Gloyne . . . 1733 by . . . William Lloyd." This was indorsed "true account of my family and origin. Thomas Lloyd, Cwm Gloyne." A witness proved that this was in the handwriting of Thomas, and that he had himself found the document fifty years ago among the papers of the Cwm Gloyne family at that place. It was held that the document was, at all events, admissible to show the relationship of those persons who were described by the maker of it as living, and who might be presumed to be personally known to him.

It is in this connection that family Bibles, "inscriptions on tombstones,<sup>1</sup> coffin-plates, mural tablets, hatchments, family portraits, rings, and pedigrees," play a part. The first "stand upon a somewhat different footing, not because of the sacred nature of the volumes, but from the customs of using them as family registers.<sup>2</sup> Entries therein are receivable on the grounds of publicity and family acknowledgment without proof of identity, relationship, or (presumably) death. The mere fact that the book is a Bible, however, is not sufficient: it should be shown to be a family Bible, in the sense of having been handed down and

<sup>1</sup> Epitaphs are proverbially untruthful, but not wilfully, perhaps, on names, dates, etc. Yet, "there are several well-known instances of such mistakes. In the epitaph upon Spenser's monument in Westminster Abbey there is a misstatement of the time of his birth of no less than forty years, and of that of his death of three years. The time of death is erroneously stated on the monument of Sterne . . . and the time and place of birth on that of Goldsmith" (Phillips on *Evidence*, vol. i., p. 213, 10th edit.). Taylor (sec. 652) says that the presumption that relatives would not permit an erroneous inscription to remain "is doubtless often contrary to the fact." He adds that he has "found on a monument in a London cemetery this startling announcement: 'The victim of a mother's temper.'"

<sup>2</sup> "In America," said Lord Redesdale, in 1811, "where there is no register of births or baptism, hardly any other is known" (Berkeley Peerage Case, 4 Camp. 421). (See pp. 202-3).

preserved as such in the family, and should come from the custody of a member thereof.”<sup>1</sup> If the other things in the list, “have been publicly exhibited they will be admitted on the presumption of family acknowledgment, though their authors be alive.” Finally, under this head we may notice that “in the case of *marriage*, the repute and conduct need not be confined to the family, reputation among and treatment by friends and neighbours being receivable” (as we saw above, p. 202); but such reputation must be general, i.e. not repose on what some particular person said.

## 40. Dying Declarations

By far the most important of statements of dead persons admissible in evidence is the “dying declaration” of some one who has been killed<sup>2</sup>—at the trial of some one for his or her death. The charge must be one of murder or manslaughter, and the declaration must be shown to have

<sup>1</sup> Phipson, ch. xxvi.

<sup>2</sup> This must not be confused with the occasion when a *magistrate* attends at the bedside of any one dangerously ill, and takes down his or her sworn statement relating to any indictable offence, *and* the person against whom the statement is made (almost invariably the accused) had an opportunity of being present and cross-examining on such statement. If the maker of the statement dies, or is likely to die, the statement may be read at the trial; of course, with the cross-examination. If the suspected person cannot be found, the statement is not evidence, but it may contain “dying declarations.”

It may be mentioned here, that what witnesses swear at a police court may, if they die or become insane, or too ill to travel before the trial, be read then. But the mere fact that the witness cannot be found does not let in such reading, unless the party against whom that testimony tells has got the witness away. In 1851 three men were tried for robbery with violence. It was proved at the trial that one of the three had got away one of the witnesses against them. Accordingly her evidence was read against all three, but as two were not implicated in getting her away, this was unfair, and the trial was set aside. The jury had acquitted the actual getter away; the other two were ultimately transported for ten years (*R. v. Scaife*, 17 Q. B. 238).

been made under a sense of impending death. The obvious reason for admitting such a statement is that it proceeds from the victim himself, who presumably knew what was going on, and that often, where there are no other witnesses, criminals would escape altogether if it was not admitted. The truth of it is guaranteed with a very high degree of probability, because, as a matter of fact, people at the point of death do not lie.

The importance of this rule may be seen in a case<sup>1</sup> which excited much controversy. A man was convicted of the murder of a woman at Ipswich and hanged. At the trial it appeared (among much other evidence) that the deceased came suddenly out of the house where the man was "with her throat cut, and on meeting" a woman "said something, pointing backwards to the house. In a few minutes she was dead." The judge refused to allow what she said to be repeated on the ground that there was no evidence that she knew she was dying. As a matter of fact, she had said, "See what Harry has done," which alone would probably have been fatal to the accused. But "there was a strong movement in favour of the prisoner on the ground that the woman's statement had been rejected, and that it might have been in his favour. . . . and if the circumstances had been less conclusive it is possible the movement might have been successful. Suppose" the words "had been, 'See what he has driven me to!' they would have been sufficient probably to secure an acquittal. And it was impossible to say what, on cross-examination, the words might have appeared to be." Surely, if impending death be a guarantee of a speaker's truth, this woman's words might have been believed. The exclusion of them reduced the rule to a mere technicality.

<sup>1</sup> *R. v. Bedingfield*, 1879, 14 Cox, Criminal Cases, 343.

Suppose her last words had exonerated the accused: would it not have been monstrously unfair to exclude them?

The same incident illustrates another rule, viz. that of relevance. This is thus stated by Mr. Phipson:<sup>1</sup> "Acts, declarations, and incidents which *constitute* or *accompany* and *explain* the fact or transaction in issue are admissible for or against either party," and explained by Taylor<sup>2</sup>—"The affairs of men consist of a complication of circumstances so intimately interwoven as to be hardly separable from each other. Each owes its birth to some preceding circumstance, and each in turn becomes the prolific parent of others, and each during its existence has its inseparable attributes, and its kindred facts materially affecting its character and essential to be known, in order to a right understanding of its nature." In other words, where does an act or fact begin or leave off?—a difficulty, indeed, which is constantly arising in human affairs—always when we seek to put what we call consequences down to certain causes. Such a speculation is like the inquiry where the ever-widening circles generated by a stone dropped into water stop, to which, by the way, Carlyle likened conduct. But in practice a limit must be found, and it is supplied by the discretion of the individual judge, "for there are no fixed principles for dealing with this question." Thus in the case last mentioned the judge refused to let in the woman's last words on (what may be called) "the whole story," theory saying that that statement was not part of anything done or something said while something was doing, but something said *after* something done. It was not as if, while being in the room, and while the act was doing, she had said something which was heard; it was something stated by her after "it was all over, whatever

<sup>1</sup> Ch. vi. (1921).

<sup>2</sup> Sec. 583.



it was, and after the act was completed." The distinction here between *something doing* and *after something done* is indeed fine, but it serves the better to show that the meaning of this rule is to exclude anything which cannot fairly be said to be part of the whole story under discussion. Everybody will agree that a statement by an interested party, or indeed, any one a long time after an event, should be excluded—unless, of course, he or she is there to answer for it—for it may be partly the result of reflection or imagination.<sup>1</sup>

Thus to take Mr. Taylor's instances "on the trial of Lord George Gordon for treason [1781], the cry of the mob who accompanied the prisoner was received in evidence as forming part of" the whole story, "and showing the character of the principal fact." (Observe that the only direct evidence possible of the exclamations of the mob would have been, at most, that of individuals who saw and heard the individual rioters near them shouting. One of the points to be proved was that there was a mob acting in common: the cry of such a concourse could not be simulated—it must have been animated by, and, therefore, an index to a common purpose.) "What the driver said *directly* after a child had been knocked down by his train is also evidence. On an indictment for manslaughter a statement how the accident happened made by the deceased *immediately* after he was knocked down has been held admissible." The parts of the whole story, then, must hang closely together in time.

<sup>1</sup> The reader must remember that we are glancing at the chief exceptions to the grand rule that only such evidence may be given as the givers can be cross-examined on.

Where there can be no cross-examination, there must be very strong presumptions of the truth of the unsworn statements, as has been pointed out in each exception respectively.

How far afield from the centre of events the story told may range is often a difficult legal puzzle, which cannot be tracked here. That it may go very far is seen from the following instance.<sup>1</sup> In 1881 the *Mary Nixon* struck on the wreck of the *Douglas* off Gravesend and was damaged. Her owner brought an action against the owner of the wreck for negligence in not showing the proper wreck lights. The *Douglas's* people proposed to call the captain of a tug whom the mate had instructed to go to Gravesend to report the sinking of the ship to the proper authority, and to show that shortly afterwards the captain told him that the harbour-master had said that he would presently send something down; and it was held that they were entitled to put this evidence in, "for the evidence was tendered as relating to an act done and tending to disprove negligence, a competent person having been sent to inform the harbour-master." Note that there was no difficulty about the captain of the tug going into the box, and telling the message given him by one of the parties (through a representative), despite the absence of the other party, for the giving of that message was an integral part of the whole story, and a very obvious proof that one precaution, at any rate, was not neglected. Indeed, if the mate had written a letter to the same effect, and then died, the letter could have been produced for the owners of the *Douglas* to show the real state of things at a critical moment. But it was a much stronger thing to allow the captain of the tug to report the conversation behind the backs of both parties between him, a third party, and the harbour-master a fourth; apparently, if the latter had passed him on to some one else—a fifth—he could have detailed his remarks too.

<sup>1</sup> The *Douglas*, 7 P. D. 157.

## 41. "Public" Documents

The third class of exceptions to the rule against "hearsay" (p. 188), consists of statements contained in public documents. The principal<sup>1</sup> of these are: (1) Statutes, State Paper and Gazettes; (2) Public Registers; (3) Public Inquisitions, Surveys, Assessments and Reports; (4) Official Certificates; (5) Corporation, Company, and Bankers' Books; (6) Published Histories, Maps, Tables, &c.—the last as dealing with matters of *public* notoriety.

It is plain that all these writings attain a high standard of truth, and that there is little fear of doing injustice by letting them in without insisting on the presence of the authors, if alive, for cross-examination; indeed, generally there would be injustice in excluding them. Nevertheless, in each kind there are "qualifications" of the admissibility of the documents (though they cannot be treated here) tending to exclude those where there is any reasonable chance of error. Perhaps the most liberal concession in the list is that of Commercial Companies' books; but it only extends to certain points about which, in the absence of fraud, there can hardly be any mistake. And here, *as in all cases* where the authors of statements are not present to be cross-examined, it is open to the litigant affected to show that there has been mistake or fraud. Even judgments, when put in evidence, may be impeached on a proper ground.

## 42. Equity and Chancery

It is impossible to explain the present function of the Equity or Chancery Courts without a reference to their origin and history. There is nothing more interesting in

<sup>1</sup> Phipson, ch. xxix.

legal annals than that history which shows that this institution is a peculiarly English home growth, and practically unique. Thus Blackstone says, "This distinction between law and equity, as administered in different courts, is not at present known, nor seems to have ever been known in any other country at any time" (Book iii., ch. iv., p. 50).

Two things strike people as civilisation progresses and society grows in knowledge, wealth, and physical improvements, viz. the hardships and injustice sometimes inflicted by adhering to a fixed system of law, i.e. through its technicalities, and the want becoming conspicuous from time to time of laws to meet wrong-doing not till then conceived. In both cases justice requires that the existing law should be supplemented; thus—a modern instance of the latter—much of our company law was designed to supply proved defects. But early legislation, as we have seen (p. 17), by no means implied Acts of Parliament; lawyers and other officials, including the sovereign, often made the laws. Of one class of occasional hardships, instances would be a debtor or a tenant compelled to pay a debt or rent twice over (say, through neglect of some legal precaution), or a legatee or other beneficiary under a will losing what the testator clearly intended to leave to him or her through the donor's non-compliance with a technical legal rule (e.g. that there must be two attesting witnesses). We are too familiar in daily life with the spectacle of the surety ruined through a too confiding friendship; of the goodly estate eaten up by the exactions of the usurer; of the too complacent trustee, who ultimately has to pay for his easiness out of his own pocket; and, generally, of those who are "let in" by the misdeeds or misfortunes of others. No one to-day would propose to relieve such

sufferers from their legal losses out of unorganized pity; whatever relief there is is regulated by law. But it by no means follows that in the early development of our law its authors deliberately set to work *only* to remedy actual failures of the law to do justice where it had been invoked (by being misapplied or not applied to a sufficient extent); they may very well have aimed generally at the "correction of the law where it fails through its too great generality" (in statement)—Aristotle's definition of equity<sup>1</sup>—and not differentiating between one individual hard case in law and another, have been by no means averse from admitting even compassion into their judgments. In short, in the great movement of our law after the Norman Conquest, there came a moment when it was seen that alongside the other tribunals was wanted a jurisdiction something like that of the old Eastern *cadi*, who sat under a palm tree and decided each case as it came along, regardless of everything except natural justice. One inquirer into the subject puts it thus: "Cases arose for which the common law gave either an inadequate remedy or no remedy at all. Moreover, even where the common law offered a remedy, yet if the parties were unequally matched in wealth and in influence, the weaker party often had little chance of obtaining a judgment in his favour, or, if he obtained it, of enforcing it.

To meet these difficulties, it became necessary for the sovereign to exert that judicial authority which he had not yet parted with, and he exerted it by delegation sometimes to his council and sometimes to his chancellor. . . . It is clear that the council was mainly concerned with cases in which the complainant had a remedy at common law, but that remedy was rendered unavailing by the influence

<sup>1</sup> *Ethics*, v. 10, 6.

of his adversary over the jury, the sheriff<sup>1</sup>, or the judge; while matters in which the complainant had no remedy at law came more frequently before the chancellor, at first, apparently, by delegation in particular instances, and then by a general delegation. . . . The origin of the independent jurisdiction of the chancellor is generally sought in a proclamation of Edward III. in 1349, to the Sheriffs of London."<sup>2</sup>

It is clear that in the development of this "plant of marvellous growth" the chancellor<sup>3</sup> played a great part, and his office gave its name to the concrete institution, viz. Chancery. Now, "he was, if one may say so, secretary and managing director all in one, and being invariably in early times an ecclesiastic, he was always at the king's ear, he kept the king's soul, and the king's seal."<sup>4</sup> The organization

<sup>1</sup> Literature abounds in instances and general complaints of the (amazing) power of officials; the early common lawyers enlarge on the crime of "Oppression." Cf. Evelyn (*Diary*, Ap. 8, 1685): "This day my brother of Wotton and Mr. Onslow were candidates for Surrey . . . and were circumvented in their election by a trick of the Sheriff's taking advantage of my brother's party going out of . . . Leatherhead to seek shelter and lodging . . . proceeding to the election when they were gon."

<sup>2</sup> Ashburner, *Principles of Equity*, ch. ii.

<sup>3</sup> "Chancellor," from *cancellarius*, perhaps in its meaning of "a clerk" (Sweet, *Law Dictionary*). This official was by no means always the great dignitary he is at present. "As compared with the justiciar, the chancellor was at first a humble personage. He was the chief domestic chaplain of the king, and did the secretarial work, presumably because he possessed the rare gifts of being able to read and write. He apparently resided in the palace, and we know that he had a daily allowance of five shillings, a simnel [a cake], two seasoned simnels, one sextary of clear wine, one sextary of household wine, one large wax candle, and forty pieces of candle. In the time of Henry II. this allowance was made only" if he dined out; "if he dined at home, he only got three and sixpence, with a slight variation in the other commodities" (Carter, *History of English Legal Institutions*, ch. xv.).

To this day one of the Chancery Courts is called the "Lord Chancellor's," though he very seldom sits there. See an instance in the *Times* Aug. 7, 1906, *ex parte* Lapierre.

<sup>4</sup> Carter, 1st edn., ch. xiv.

for achieving the ethical virtue of equity was appropriately dominated by the keeper of the conscience of the supreme judge<sup>1</sup> in the State, and soon the distinguishing mark of the Chancery was that it "acted on the conscience." And this characteristic tendency it has never lost.

"It was," says the writer<sup>2</sup> already quoted, "a court of conscience in two senses. In one sense the jurisdiction was exerciseable according to the conscience of the chancellor, although his conscience . . . was fettered more and more by authority; in the other sense the jurisdiction was exercised on the conscience of the defendants. The objects of a court of civil judicature, as now understood, are to determine proprietary rights, enforce obligations, and redress wrongs by granting damages. The earliest descriptions of the equitable jurisdiction lay stress upon a different principle. The object of the Court of Chancery was, in the first instance, the purification of the defendant's conscience. It was a cathartic jurisdiction." [Remember that the judges were prelates or priests of the Church which highly esteems confession, penance, and absolution.]

"If a person is allowed to remain in possession of property which it is against conscience for him to retain, his conscience will be oppressed, and the court, out of tenderness for his conscience, will deprive him, notwithstanding his resistance, of what is so heavy a burden upon it. This principle is at the bottom of the leading doctrines of the court. If property is given to me in confidence to deal with it for the benefit of another, or if I declare that I will deal with the property for the benefit of another, my conscience would be polluted if I denied the existence of an

<sup>1</sup> This title was literally true of the early Norman sovereigns (*Cartier*, ch. xiii.).

<sup>2</sup> Ashburner, ch. ii., part iv.

obligation, and attempted to retain the property for myself. If I lend money on the security of property it would be against conscience for me to rely on the form of the conveyance as giving me any larger interest in the property than is adequate to compensate me my debt with interest thereon, and my costs, charges, and expenses. If I have undertaken to perform a duty, my conscience might be affected if I acquired an interest inconsistent with that performance; and a court of equity, to prevent the slightest stain from attaching to my conscience, disables me from retaining such an interest if I have acquired it. If I obtain a benefit by fraud, actual or presumed, or by undue influence, actual or presumed, it would be against conscience that I should retain it. Moreover, it may be against conscience for me to retain property, although I did nothing against conscience in acquiring it. Thus property which I have obtained by an innocent misrepresentation, must be restored to the original owner."

And it seems<sup>1</sup> that "the common people" actually called Chancery the Court of Conscience; our authority for this adding, "yet herein conscience is so regarded that Lawes be not neglected, for they must joyn hands in the moderation of extremity." He also says,<sup>2</sup> speaking of *Summum jus*<sup>3</sup> "which oftentimes precisely regardeth the very letter and words of the Common Lawes: For remedy whereof,

<sup>1</sup> <sup>2</sup> *West Symbol*. 176b. in 1641, and so Cardinal Wolsey said (1 *Cavendish's Life*, p. 217).

<sup>2</sup> *Ibid.*, 173b.

<sup>3</sup> *Jus summum saepe summa est malitia*, says Syrus, Ter. Heaut. 796. *Summum jus summa injuria*, Cicero, *De Officiis*, I. 10, which may perhaps be translated, "Extreme law is extreme injustice." An anonymous writer in 1751 paraphrases it. "Laws are compared to grapes, which, being too much pressed, yield an hard and unwholesome wine" (*Grounds and Rudiments*). Burke referred to it as "that over-perfect kind of justice which has obtained by its merits the title of the opposite vice" (*Economical Reform*, 1780).



parties grieved pray aide . . . of Chancery to bridle extremity and reduce such rigour to Equity and Conscience." So, in 1726, Lord King, the chancellor, said, "We do not always here consider what the strict intent of the party was, but consider what is equitable and just: and then suppose the party meant that, and so decree it; else I am sure nine in ten of our decrees could not be supported."

A tribunal which adopts a tone of the sort heard in these extracts is obviously in a very different position from that of one which must allow Shylock's claim when he sues upon the bond. A natural jealousy sprang up in the *regular* judges—as they may be called as against the *irregular*—partly, perhaps, from professional bias, and partly from the conviction that the common law and statute law were the only sure guarantees of liberty. This dislike was inflamed when the new court actually came into collision with the old, and though the chancellors often framed a "harmony" between their Equity and the Law, for centuries there was a certain hostility between the two "sides" of Westminster Hall. The following passage from the authority already cited makes these points clear:—

"In most systems of judicial organization, the distribution of contentious matters between the different courts is, as a rule, determined either by the importance of the controversy from a pecuniary or other standard, or by the nature or locality of the subject-matter in dispute, or by the domicile or status of one or both of the parties. In England the distribution before the Judicature Act (1873) was based upon a different principle. The Court of Chancery and the courts of common law dealt with precisely the same controversies; but they decided them in many cases on contradictory principles. The courts of

law, in the exercise of their jurisdiction, ignored, not only the doctrines, but also the existence of the Court of Chancery. At law, a trustee or mortgagee under a forfeited mortgage was treated as the absolute owner, and money given to the separate use of a married woman belonged at law to her husband; . . . it was no justification in law of an act, that it had been done under the authority of a court of equity. Thus, if an executor made payments under a decree, the decree could not be pleaded or given in evidence in an action brought at law by a creditor of the testator. Collisions between the two jurisdictions were obviated to a certain extent by the equitable doctrine that equity acts on the person. The Court of Chancery disclaimed all authority to sit as a court of appeal from the courts of common law, or to exercise a dispensing power over their judgments." "Decrees upon suits brought after judgment" according to an order of Lord Bacon (Chancellor, 1618-21), "shall contain no words to make void or weaken the judgment, but shall only correct the corrupt conscience of the party and rule him to make restitution or to perform other acts according to the equity of the cause." "Though this court," said Lord (Chancellor) Hardwicke (in 1749), "cannot set aside a judgment of a common law court obtained against conscience, yet will it decree the party to acknowledge satisfaction on that judgment, though he has received nothing, because obtained where nothing was due. So it cannot set aside a fine [a mode of conveying land, now obsolete] for being obtained by fraud and imposition, . . . yet, on a conveyance so obtained, this court never sent the plaintiff to the Common Bench to set it aside, but considers the person obtaining the estate, even by fine, as a trustee, and decrees him to reconvey on the general ground of laying hold of the

ill-conscience of the party to make him do what is necessary to restore matters as before."<sup>1</sup>

Upon this passage from Lord Hardwicke, the same writer remarks, "The old relation between equity and common law is illustrated by the following fact. A court of equity could not release from prison a debtor who had been taken in execution at law, although the court was satisfied that he was entitled on equitable grounds to be relieved from liability. Their only weapon was to imprison the creditor till he released his debtor, and it sometimes happened, if the creditor was obstinate, while the debtor was in prison on a writ issued by the creditor, the creditor was himself in the Fleet for contempt of a decree in equity." Again, "In the reign of Elizabeth, continual skirmishes took place between the two jurisdictions. . . . In 1587, Taylor was ordered by a decree in equity to pay money to More, and was imprisoned in the Fleet for non-compliance with the decree. The Court of the Queen's Bench, which had given a judgment in Taylor's favour, granted a *habeas corpus* to the warden of the Fleet, and discharged Taylor. At the same time, More's counsel was indicted. . . . Taylor was soon re-arrested under an order of Sir Christopher Hatton, and Taylor's counsel, who confessed in open court that he had penned the indictment, was also committed to the Fleet. In 1589, Taylor, who had been a close prisoner in the Fleet for more than a year, made an abject submission to the chancellor. In 1616, James I. gave a decision in favour of the equitable jurisdiction,<sup>2</sup> and from the Restoration it was exercised

<sup>1</sup> Ashburner, ch. i.

<sup>2</sup> This refers to the great pitched battle between the chancellor, Lord Ellesmere, and Coke, chief justice. In a case tried before Coke, a verdict had been obtained by the following gross fraud, "by decoying away a necessary witness of the defendant and making

without opposition, although not without occasional murmurs."

Finally, the great Selden, who died in 1654, and whose *Table Talk*, compiled by his secretary, was published in 1689, illustrates the persistence of the idea that equity means what one mind, viz. the chancellor's, thinks equitable: "Equity is a roguish thing. For law we have a measure, and know what to trust to: equity is according to the conscience of him that is chancellor, and as that is larger or narrower, so is equity. 'Tis all one, as if they should make the standard for the measure we call a foot a chancellor's foot. What an uncertain measure would this be! One chancellor has a long foot, another a short foot, a third an indifferent foot: 'tis the same thing in the chancellor's conscience."

### 43. The Subject-Matter of Equity Suits

What sort of cases, then, are heard in the Chancery Courts? Learned writers have traced in interesting volumes the growth of the ideas, the germs of which have just been described, into the actual practice at the present day. We can here only touch on the two extremes of the history.

"Two lines are attributed to Sir Thomas More [Chancellor about 1530]: 'Three things are to be helpt in conscience—fraud, accident, and things of confidence.' 'It was the province of equity,' said Sir Julius Cæsar, Master of the

the judge believe he was dying. The witness was taken to a tavern and a bottle of sack ordered for him; as soon as he put it to his mouth, the emissary went back to court, and when the witness was called, the emissary swore that he had just left witness in such a state that if he were to continue in it a quarter of an hour longer he would be a dead man" (Carter, ch. xv.). The chancellor granted a perpetual injunction against the execution of the judgment.

Rolls [about 1615], 'to remedy frauds, breach of trust, extremity of common law or undue practices.' 'Touching the affirmative part, what matters are relievable in the Chancery?' said Norburie in the reign of James I. 'I have heard they must be one of these kinds, viz. matters of fraud, trust, extremity, or casualty; or else not lightly to be dealt in here.'"<sup>1</sup>

What does this jurisdiction include at the present day? The answer hinges upon the great Judicature Act of 1873, which assigns<sup>2</sup> to the Chancery Division—

"All causes and matters for any of the following purposes:—

"The administration of the estates of deceased persons;

"The dissolution of partnerships or the taking of partnership or other accounts;

"The redemption or foreclosure of mortgages;

"The raising of portions, or other charges on land;

"The sale and distribution of the proceeds of property subject to any lien or charge;

"The execution of trusts, charitable or private;

"The rectification or setting aside or cancellation of deeds or other written instruments;

"The specific performance<sup>3</sup> of contracts between vendor and purchasers of real estates, including contracts for leases;

"The partition or sale of real estates;

"The wardship of infants, and the care of infants' estates."

<sup>1</sup> Ashburner, ch. iv.

<sup>2</sup> Sec. 34.

<sup>3</sup> Where damages for breach of a contract (e.g. to sell land) would be inadequate compensation, the court may order the contract itself to be fulfilled.

Acts of Parliament have from time to time assigned other matters to the Chancery Courts. "The statutory jurisdiction of the Court of Chancery relates principally to Charities, Companies, Trusts, Infants, and Married Women."<sup>1</sup>

The common attribute of all the causes here enumerated is that they relate to property, and for a very long time the Court of Chancery has only concerned itself with the interests of its litigants in property: a penniless child cannot be made a ward in chancery. At first sight there would seem to be no connection between the name of a street and the rights of property, but when in 1885 the Corporation of Dublin resolved to change the name of Sackville Street to O'Donnell Street, a Chancery Court restrained them by an injunction in an action by some householders in the street, who objected on the ground of "inconvenience and of detriment to their trades and businesses."<sup>2</sup>

Perhaps equity as a vindication of morality was never more completely identified with equity as the defence of property than in a case<sup>3</sup> where one partner sought to turn another out of a drapery business under a deed which provided that this might be done for "scandalous conduct detrimental to the partnership business . . . or any flagrant breach of any of the duties of a partner," and the latter had been convicted of travelling without a railway ticket and fined forty shillings. The judge thought that such a fraud was a breach of the duty of one partner towards another, and permitted the expulsion until an action could be tried.

<sup>1</sup> *White Book for 1921*, on another part of the section just cited (part v., p. 2070).

<sup>2</sup> 15 L. R. Ir. 410.

<sup>3</sup> *Carmichael v. Evans*, 1904, 1 Ch. 486.

## 44. Equity Courts

The epoch-making statute last cited must now be briefly mentioned. It must be clear, even from the references here, where the subject has barely been skimmed, that for centuries, if there was not open hostility, there was a want of harmony, of "solidarity" as the French say, between the two great co-existing systems of law; each refused to recognise the other.<sup>1</sup>

The troubles of the suitor were, says Mr. Ashburner, "increased by the equitable rule which refused to admit one trial at law as decisive upon the legal right, except in cases where the Court of Chancery had itself directed an issue. Moreover, a court of equity was confined to its own peculiar remedies; it could not give damages for a breach of contract or for a tort."<sup>2</sup> If a plaintiff sought to restrain a threatened invasion of his proprietary right, and the court held that no invasion was threatened in the future, but was satisfied that the right had been invaded in the past, the court could not give damages for the wrong already done. If a plaintiff sought specific performance (p. 225) the court could not give him damages as an alternative remedy. In both cases the plaintiff was obliged after his suit in equity to go to a court of law."<sup>3</sup> Thus, a Chancery court could not give damages, the chief weapon of the courts of law, which, in their turn, were not armed with the injunction, i.e. an

<sup>1</sup> Even since the Act, the old dislike occasionally crops up. A great judge once said, "I often hear eminent counsel talk of 'an equity' in the case. It always reminds me of the story that Confucius once called his followers together and asked them what was the greatest impossibility conceivable? None could answer. Then he said that it was when a blind man is searching in a dark room for a black hat which is not there." And see the last note to this section (p. 235 n.<sup>1</sup>).

<sup>2</sup> I.e. a wrong unconnected with contract, e.g. an assault or a libel.

<sup>3</sup> *Principles*, ch. i.

order, generally, not to do something, but it might be, positively, to do something—the peculiar truncheon of equity, disobedience to whose decree was, and is, punished by imprisonment.

Gradually some of the powers of the common-law courts were conferred on the Chancery Courts, and at last, in 1873, the Judicature Act abolished all differences between the powers of one set of judges and those of another over the remedies of suitors, and Chancery judges now award damages and common-law judges grant injunctions.<sup>1</sup> The authority already cited so frequently on this subject says (*ibid.*), “The main object of the Judicature Act,” said Lord Watson, “was to enable the parties to a suit to obtain in that suit, and without the necessity of resorting to another court, all remedies to which they are entitled in respect of any legal or equitable claim or defence properly advanced by them, so as to avoid a multiplicity of legal proceedings. . . . The Act of 1873 deals with the remedies, and not with the rights, of parties litigant. It was not intended to affect, and does not affect, the quality of the rights and claims which they bring into court and submit to the judgment of the court, whether as plaintiffs or as defendants.” The Judicature Act has conferred upon one and the same tribunal the jurisdiction which before that Act was exercised separately by the courts of equity and the courts of common law;—and its provisions prevent

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<sup>1</sup> This fusion was advocated in 1651 by William Sheppard (in *England's Balme*, cited by Ashburner, c. i.) and by Roger North (*Life of Dudley North*), written probably before 1700: “And even here very good patriots have declared it fit that the court having jurisdiction of the cause in point of law should also judge of the equity emergent thereupon; but the present constitution doth not allow it.” The writer as a practising Chancery barrister is a very good contemporary authority. Burnet also (*History*, 659) advocated this reform about 1720.



any collision between the principles by which these courts before the Act were respectively guided. A claim which before the Act could only have been adjudicated upon in the Court of Chancery, because the courts of common law did not recognise its existence, can now be lawfully adjudicated upon by any division of the High Court of Justice or any judge of any division; and the apportionment of suits is based upon considerations of convenience, and not upon differences of jurisdiction. Where a man before the Judicature Act became entitled by the same causes of action to two distinct remedies, one of which he could only pursue in a court of common law, and the other only in the Court of Chancery, he can and must, since the Act, pursue both his remedies in one proceeding; and if the remedies are cumulative, the same court in one proceeding will give him both, while, if they are alternative, the court will give him that remedy which is adapted to the circumstances of his case. *But the two streams of jurisdiction, though they run in the same channel, run side by side, and do not mingle their waters.*"<sup>1</sup> Possibly it might have been added that some craft may be launched and may float on either.

The present state of things is that there are (besides the Lord Chancellor) six equity judges of the High Court each sitting separately and without a jury. One division of the Court of Appeal deals with appeals from these judges, and consists, like the other division which deals with appeals from other courts, of three judges. The general rules of procedure, evidence, costs, etc., are those already described (pp. 51, 78 and foll.); indeed, many of the examples have been

<sup>1</sup> See, for instance, the last note in this section (p. 235 n.<sup>1</sup>), which illustrates the fact that the distribution of litigation between the two "sides" goes on much the same as before the Judicature Act.

taken from Chancery Courts. Witnesses figure in litigation here much less than in the other courts—and their appearance at all is a modern concession<sup>1</sup>—because the questions for decision are almost entirely questions of law; indeed, these courts have long been famous for their legal learning and the chief home of legal lore. Hence the atmosphere of Chancery has not been very favourable to emotional interest or to anything sensational,<sup>2</sup> and hence, perhaps, its most distinctive peculiarity—a jury is unknown in its courts. Generally such facts as are in dispute are left to the judge to decide, but if the court is in doubt or unwilling to decide the issue (where, for example, crime or some sorts of fraud are alleged), it has power to send the whole case, or any issue of fact, to be tried by a judge and jury on the common-law side in the ordinary way, or at the assizes, or anywhere else. Under the present practice, says an authority,<sup>3</sup> the Chancery division will refuse to order an action to be tried before a jury unless there is a simple question of fact the verdict upon which would decide the issue in the action; and even then it is a matter of discretion. Practically the whole of the work of Chancery is done in London, with the very important exception of that which is within the jurisdiction of the Court of the

<sup>1</sup> There is a story that before this innovation it was suggested to an eminent practitioner that he should see a person whose evidence (by affidavit) he would have to rely on, and that his answer was, "I will have no flesh and blood in these chambers."

<sup>2</sup> Mr. Augustine Birrell, K.C., speaks of "the flutter of excitement" when at one time "two or three married ladies" would be interrogated by the judge. "To introduce these ladies to the judge, to tell him their names, and the precise amount of their respective shares, was a piece of business generally supposed to put a heavy tax upon the readiness and resource of a Chancery junior, and it was, at all events, his nearest approach to the flutter of *nisi prius*, or the excitement of cross-examination" (*On Trustees*, Lect. I.).

<sup>3</sup> Daniell, 1 *Chancery Practice* (1914, p. 666), ch. xiv., sec. 3.

County Palatine of Lancaster, which sits at Manchester and Liverpool. There is a similar survival from ancient times at Durham. The County Courts can deal with equity cases where (speaking very roughly) the value of the property in dispute does not exceed five hundred pounds, but they have little to do on this "side."

The present reputation of the Chancery Courts is in such vivid contrast with their long evil notoriety that a word must be said about their general history. Taken up from an early time, as we have seen, with the rights of property or controlling funds in court, they could only be resorted to—as they still are largely, though by no means exclusively—by the rich, or those charged with great pecuniary interests, such as those of railway companies, banks, etc. And they administered a system of law peculiar to themselves, and understood even among lawyers by one group only. They saw neither witness<sup>1</sup> nor juryman, and, except through papers, hardly came into contact with an outside world, for whose benefit, after all, the tribunals existed. No surroundings could be more conducive to an excess of professional bias—a form, perhaps, of Herbert Spencer's "class bias" an interest in and a love of their particular branch of the law for its own sake, overflowing into the nooks and crevices of the most minute points. The process of *dehumanisation* was no doubt aided by a strong sense that as they were not under the strict letter of the law (as other lawyers were), they were morally bound to avoid arbitrariness and conflicting decisions by a scrupulous

<sup>1</sup> "Chancery suits, above all things, required an unruffled atmosphere, and from year's end to year's end the real live suitor, whose pocket kept the whole thing going, gave no hint of his actual existence. If he were ruined, as he too often was, it was done out of sight of judge and counsel" (Birrell on *Trustees*, Lect. I.).

respect for the precedents<sup>1</sup> created by their predecessors (generally the Chancellors). Hence the special learning and research—required in any case by the knottiness of the questions raised—but hence, too, the slowness, cumbersomeness, and delay (the latter largely due to the fact that the Chancellor was generally wanted somewhere else, especially in the House of Lords), leading in their turn to monstrous expense, which became the tradition of the Court of Chancery. The ready instruments of torture were appeals. “It is recorded that a case was heard in February, 1830, in which there had been seven trials—three before judges of the King’s Bench, and four before the Lord Chancellor—at the close of which the suit floated serenely upwards to the House of Lords.”<sup>2</sup> The rehearings were often due to the fact that the Chancery judges were never sure what view the common-law judges would take of the facts. The comparative wealth of the suitors, perhaps, helped to encourage the waste of money.

Thus an institution which had started on its career as the home of “conscience” became a heap of abuses. Every period of English literature, till recent times, bears witness to this, and to the present day to have one’s head

<sup>1</sup> “Both Lord Eldon (1818) and Lord Redesdale (1802) insisted that courts of equity were governed in their decision by principles as fixed as those of the common law” (Ashburner, *Principles*, ch. ii., pt. iv., who, however, observes, “The principles of equity did not really become rigid until the Judicature Act,” *ibid.*) perhaps the most striking illustration of the tendency of all codes to become inflexible, the system of equity having been expressly designed to mitigate the rigour of another system.

<sup>2</sup> Dr. Blake Odgers, in *A Century of Law Reform*, ch. vii. He goes on, “No doubt, when a suit reached its final stage—when all inquiries had been made, all parties represented, all accounts taken, all issues tried—justice was ultimately done with vigour and exactitude. Few frauds ever in the end successfully ran the gauntlet of the Court of Chancery.” “But granting full relief may be had, what doth it cost to come at it?” asked Roger North (cited p. 182).

in chancery is a colloquial expression for something physically very unpleasant.

No writer on this subject is so well known, or made so great an impression, as Dickens. But he had great fore-runners,<sup>1</sup> of one of whom a few words may be quoted. Brougham, himself destined to preside over the court, endorsed<sup>2</sup> in the House of Commons, in 1823, the opinion "that that court was a great public grievance, and the severest calamity to which the people of England was exposed." Finally we may refer—not to the great novelist—but to a learned lawyer, commenting on him by the way of calm annotation of a leading case<sup>3</sup>—one arising out of a will made in and speaking from 1818, in which litigation began in 1821 and ended in 1833, and "identified in the tradition of the Chancery Bar with the suit of *Jarndyce v.*

<sup>1</sup> The curious may like to consult references in such different authorities as Pepys, under date April 25, 1666; Roger North, *Lives and Autobiography*, almost *passim* (about 1700); Burnet, *History of his own Time*, 378 and 659, about 1704; Sydney Smith, *Peter Plymley's Letters*, x., 1807; John Stuart Mill, *Political Economy*, v. 893, about 1848; Herbert Spencer, *The Study of Sociology*, ch. xi., 1873; Spencer Walpole, *History*, vol. iii., ch. xii., 1880. The latter says, "Every one has heard the good story of the old peeress who had insisted on remaining a few minutes in court to see how they set to work to settle her suit, which had been eighty-two years in Chancery." Compare what Dr. Odgers (cited above) says, "No man in those days could embark on a Chancery suit with any reasonable hope of being alive at its termination if he had a determined adversary." Mr. Cooper (Q.C.) published in 1827, *Lettres sur la cour de la Chancellerie*, containing a fierce attack on the Court under Lord Eldon, when things were at their worst. He says, "The curse of war has certainly not caused as much ruin and calamity in England as the Court of Chancery under this judge" (Letter 3). It might have been said that there was only an iota's difference between chancery and chicanery.

<sup>2</sup> Hansard, 781, June 5.

<sup>3</sup> *Cadell v. Palmer*, 21 *Ruling Cases*, notes, p. 129 (1900). In the *Times* of March 26, 1919, there is a report of *Lintott v. Footmer*: the testator died in 1816; it was adjourned by the Master of the Rolls in 1834. Sargant J. settled minutes of judgment and ordered enquiries who were entitled.

*Jarndyce* in Dickens's well-known description of the procedure of the old Court of Chancery. The only odd thing about that description is that the absurdity of the procedure is in no way exaggerated. Exaggeration would be impossible. In the old procedure, when an estate was thrown into Chancery, . . . every act of administration was carried out in detail by a professional army<sup>1</sup> under the direction of the Chancellor or Vice-Chancellor. . . . Similar proceedings in the same suit have gone on from time to time from the earliest memory of the oldest judge in the memory of the existing bar, and perhaps—in some sequestered chambers sadly shorn of their former dignity—are going on still." This is an interesting speculation; if there is such a survival it is almost entirely of antiquarian interest. For so far to-day are the Chancery Courts from being a "national grievance,"<sup>2</sup> that all complaints of their want of despatch and economy have disappeared, and, indeed, they are sometimes held up in respect of the former as examples to other tribunals. If an apology is needed for this digression into history it may, perhaps, be found in the pointing of the moral that legal reforms, which it took generations of struggle to accomplish, might, considering their success, well have been accelerated, and that others are still overdue. For the Court of Chancery, to

<sup>1</sup> Sir Edward Fry, the late Lord Justice, who was "called" in 1854, says that "to throw an estate into Chancery" "meant sometimes that the whole estate would be devoured by the costs of the solicitors who gathered round the corpse" (*Memoir*, 1921, p. 73). The writer of that *Memoir* records that one Chancery Court had got into such a bad state "that on one occasion the following advice is said to have been given: 'The plaintiff has no case in Law or Equity, but I advise him to file a bill in Vice-Chancellor ——'s Court and to instruct Mr. —— [counsel]. He will then probably obtain a decree'" (*Ibid.*, p. 72).

<sup>2</sup> Mr. Tierney in the House of Commons; March 1, 1824, Hansard, 604.

sum up in the words of a very critical periodical,<sup>1</sup> it "had—and no doubt still has—its imperfections; it has been derided for its dilatoriness, its propensity for hair-splitting, its 'piety and love of fees,' but who can say how much the country owes to the standard of strict integrity which that court has consistently upheld for centuries?"

## 45. Criminal Law

In ordinary parlance the common word "crime" requires no explanation, but a legal definition taxes the skill of the greatest jurists. One of the latest<sup>2</sup> of these concludes that "a crime is a wrong whose sanction is remissible by the Crown, *if remissible at all.*" In other words, only the Crown can let the offender off the punishment; the aggrieved person cannot. In a civil action, of course, he can. He is not, for example, bound to take the damages he has been

<sup>1</sup> *Law Quarterly Review*, October, 1903, p. 358. The quotation occurs in a passage worth transcribing to illustrate the relation of equity to law at the present day. Lord Bramwell, speaking of an equity of redemption, said, "It is a right not given by the terms of the agreement between the parties to it, but contrary to them, to have back securities by a borrower to a lender—I suppose one may say by a debtor to a creditor—on payment of principal and interest at a day after that appointed for payment, when, by the terms of the agreement between the parties, the securities were to be the absolute property of the creditor. This is now a legal right in the debtor. Whether it would not have been better to hold people to their bargains and teach them by experience not to make unwise ones rather than relieve them when they had done so, may be doubtful. We should have been spared the double conditions of things, legal rights and equitable rights, and of system of documents which do not mean what they say. But the piety or love of fees of those who administered equity has thought otherwise. And probably to undo this would be more costly and troublesome than to continue it" (*Salt v. Marquess of Northampton*, 1892, App. C. 18).

<sup>2</sup> Dr. C. S. Kenny, *Outlines of Criminal Law*, ch. i., 10th edn., 1920.

awarded. But the offence may not be pardonable "at all."<sup>1</sup> With this exception the Crown's power of pardon is universal, and so a crime is wrong which can be pardoned by the Crown. We might add, "and the only wrong," were it not, according to our authority, that there is one<sup>2</sup> class of civil action in which the Crown may remit any penalty awarded. But at any rate "no private person can ever grant a valid remission of any criminal sanction. Herein lies the only ultimate and unvarying distinction between the two kinds of procedure."

Obviously this definition is not of much value to a layman who wants to know whether a given act is a crime or not, nor, indeed, to a lawyer on the same quest without further inquiry. It seems quite easy to say that a crime is a wrong, *morally* worse than a wrong to right which an action must be brought in a civil court. But this is by no means so, for a slander may be diabolically wicked and manslaughter merely the result of trivial carelessness. "Indeed, a person's conduct may amount to a crime even though instead of being an evil to the community it is, on the whole, a benefit, as where a defendant was held guilty of the offence of a common nuisance because he had erected in Cowes Harbour a sloping causeway which, to some extent, hindered navigation, though by facilitating the landing of passengers and goods it produced advantages which were

<sup>1</sup> Dr. Kenny (*ibid.*) gives two instances, viz. a public nuisance, while still unabated, and under the Habeas Corpus Act, 1679, sending a man to prison outside the realm, "lest politicians obnoxious to the Crown should be kidnapped by Crown servants with impunity."

<sup>2</sup> Viz. penal actions, e.g. those brought by informers for breaches of the Sabbatarian Act of 1781, under the Remission of Penalties Act, 1875. The Crown can disappoint the informer if it chooses of his expected gain, and this, it is pointed out, is the only instance of the right of the Crown to "interfere with a civil remedy; it cannot, e.g. take away a man's damages or dissolve his injunction."



considered by the jury to more than counterbalance that hindrance.”<sup>1</sup> So “treason is legally the gravest of all crimes; yet often, as Sir Walter Scott says, remembering Flora Macdonald and George Washington, ‘it arises from mistaken virtue; and therefore, however highly criminal, cannot be considered to be disgraceful,’ a view which has received even legislative approval in the exclusion of treason and other political offences from international arrangements for extradition . . . the mere omission to keep a highway in repair shocks nobody, but is a crime<sup>1</sup>; whilst many grossly cruel and fraudulent breaches of trust are mere civil wrongs.”<sup>2</sup> Again, “it is a ‘crime’ not to send your child to school, though it cannot be prosecuted in any higher tribunal than a police magistrate’s, and the utmost possible punishment for it is a fine of five shillings. Similarly, . . . conduct may be criminal without involving any moral turpitude, as where a limited company omits to send to the Registrar of Joint Stock Companies the annual list of its members.” (*Ib.*)

Whatever the legal definition may be, most people mean by criminal proceedings a formal attempt to get punishment inflicted *as such by the State*, and not merely incidentally (as by the payment of costs in an action, exposure, etc.), and, broadly, they are right. So civil proceedings are supposed to aim at giving a man or getting him back his due (including the prevention of a threatened wrong). An ideal system would, if necessary, combine both kinds of proceedings, which ours seldom does. See p. 245.

The test of “punishment as such by the State” would be theoretically exact were it not for an exception which

<sup>1</sup> *Ibid.*

<sup>2</sup> Theoretically only.

Dr. Kenny<sup>1</sup> mentions, but which is of little practical importance, viz. penal actions, which are brought only to recover penalties, and which, therefore, do aim at punishment of the offender by the State. But this sort of process is antiquated and dying out (though not dead yet), and probably will never be revived by Parliament in the future; the policy of it is obsolete.<sup>2</sup> But even here some of these claims are civil in substance as well as in form. The popular phrase "imprisonment for debt," seems to imply punishment by the State for owing money, which is not a crime. But the phrase is very misleading. People are never sent to prison because they are in debt; but they are sent to prison for disobeying a judge's order, made after full inquiry into their means, that they should

<sup>1</sup> *Ibid.* He mentions another, viz. that class of civil actions in which "exemplary" damages may be given (see p. 135), i.e. where the award not only repays the suer for what he has lost, but "makes an example" of the sued by an additional mulct, as one punished for moral misconduct. But this is not the act of the State; this is the act of the jury, which need not, if it does not see fit (and often does not), give more than compensation damages, while the State, i.e. the judge, cannot give damages by way of *punishment* at all. Moreover, in form at any rate, the suer asks to have his loss refunded, and this abnormal kind of "damages," viz. compensation for actual damage *plus* a round sum, probably grew up because, where the loss has no definite pecuniary value, it is only human nature when there are circumstances of aggravation that, under cover of this indefiniteness, a jury should visit plain moral wrong with an assessment which, as it must be *fictitiously* definite, is designedly high, and that judges should connive at the anomaly. The list of actions in which "vindictive" damages are recognised by the judges consists of "breach of promise of marriage, assault, trespass, seduction, libel, slander, false imprisonment, and malicious prosecution" (Dr. Blake Odgers in *Encyclopædia*, "Damages")—all cases in which there may well be strong sympathy for the victim. Note that breach of promise of marriage is the only instance of a contract in this list; obviously such a breach may cause great pain and hardship.

<sup>2</sup> "These proceedings were permitted by statute at a date when the position of misdemeanours in law was not fully established, when justices had no summary jurisdiction, and the police was inadequate

pay a certain sum, on proof that they have had the means to satisfy such order (p. 12). The imprisonment cannot, as a rule, last more than six weeks, and comes to an end as soon as the sum is paid. Historically, this power as exercised by the County Court, where almost<sup>1</sup> exclusively it is invoked, has nothing to do with the punishment for contempt of court, but is a relic of the barbarous right of taking a debtor's body in execution; still there is nothing externally to distinguish punishment for such disobedience from that for contempt of court, of which, however, there is declared to be a civil and a criminal form.<sup>2</sup> It may console sufferers for these two offences to feel that the proceedings against them are civil and not criminal; but as there seems to be only the slightest *practical* distinction between any of these punishments (when they take the shape of incarceration), the relief, perhaps, is not very

to detect offences" (*Encyclopædia*, "Penal Actions"). In the rare cases, where an aggrieved person may sue for a penalty (which goes into his own pocket), there is nothing but the name to distinguish his action from one for damages—except, perhaps, that the maximum penalty is fixed by statute. The same, indeed, is true of such a suit by the Crown—the penalty goes into its "pocket"; but as this is not a private but a public gain, it cannot be supposed to undertake the action except in the public interest, to punish the offender, which is exactly what it does in all crimes. The only other class of penal actions is those brought by common informers, i.e. persons not specially aggrieved, but aggrieved to the same extent as the rest of the public—they get either the whole or part of the penalty for their pains. When one sued Mr. Bradlaugh for voting in the House of Commons without having taken the oath, the House of Lords held that unless an Act expressly gives the penalty to the informer, only the Crown can claim it (8 A. C. 354, in 1883).

<sup>1</sup> Debtors imprisoned in 1919, King's Bench Division, 1; County Courts, 207 (but nearly 41,000 orders for warrants of commitment were issued, and nearly 25,000 warrants issued; over 15,000 paid before arrest, 4,280 were *arrested*, whereupon all but the 207 paid). In 1920-1, 5,204 were arrested.

<sup>2</sup> The distinction seems academic (see Oswald on *Contempt*, etc., 2nd edit., ch. v. and ch. xiv.). It seems, however, that there are slight differences in the prison regulations between these three classes.

real. Judged by the test proposed above (p. 235), these offences are crimes, as only the Crown can release from the consequences (which for a contempt may be a fine). Perhaps it is simplest to say that contempt of court is at once a civil and a criminal offence, this anomaly arising from the fact that in truth it is not really the subject of litigation at all, for the court is the judge in its own cause, punishing for offences against its own dignity or for interference with its own special business, viz. the administration of justice in given cases. Even when there is an appeal from the sentence (which is rare and limited, perhaps, to the question whether there was legal authority to sentence), still one of the parties before the court is, so to say, another court, and there is a natural tendency to uphold the power of the judiciary.

Incidentally it will have been noticed that while all civil proceedings are undertaken with a view to get some material advantage for the individual suer, the *immediate* result of criminal proceedings is never to give anything to the specific victim of the crime (if there is one).<sup>1</sup>

It is true that fines frequently are inflicted on criminals as their sole punishment, and that the State which prosecutes them is enriched by the amount, but (to say nothing of the fact that this sum does not go into the sovereign's *private* pocket), the State whose law has been defied is in a very different position from, say, a person libelled or a

<sup>1</sup> For there need not be one, as there are "instances of crimes which do not violate any one's right," e.g. "engraving upon any metal plate (even when it is your own) the words of a banknote without lawful excuse for doing so; or being found in the possession of house-breaking tools at night; or keeping a live Colorado beetle" (Kenny, *Outlines*, ch. i.). Here the only "victim" is the State, which has chosen to consider itself aggrieved by these acts, and to make disobedience to its law a crime (see p. 46), but the State can hardly be considered a "specific" victim. And we may be said to recognise certain rights of dumb animals.

woman maltreated. Whatever benefit accrues to the Treasury from such exactions goes to the relief of the whole body of taxpayers; the hope of getting any part of them cannot be a motive to any person to charge another with a crime.

But though the *immediate* or first result of criminal proceedings is a conviction or an acquittal, incidentally they may secure the victim compensation. It commonly happens, for instance, in cases of assault or injury to property, that a sentence is mitigated if the offender makes reparation for the unnecessary expense he has caused; and it is, of course, impossible to say how often the prospect of such a result induces a victim to denounce the assailant to the police. In these particular cases of larceny or injury to property, magistrates *may* impose no other punishment on first offenders than payment of damages and costs. The courts, of course, will not be bound by any "bargain" between criminal and victim about such payment.

But there is, further, a direct means of obtaining restitution of stolen property through the conviction of the thief in respect of the particular property. It was always open (with certain exceptions) to bring an action to recover stolen property from any one with whom it might be found, who, of course, might be and often was, an innocent purchaser for full value. But since 1861, the court in which the thief is convicted may, and generally does, make an order that the property proved to be stolen shall be summarily restored to the owner into whosoever's hand, through however so many, and however innocently it has come, and even the proceeds of stolen money still in the thief's hands may be thus followed, though the money itself, if *legally* spent (but only so), cannot. Thus, in the case of

the Bank of Liverpool frauds, the judge not only ordered the money standing in the names of the guilty persons at their respective banks, and proved to be the fruits of the crime, to be restored to the bank, but also other sums standing in the name of unconvicted persons (who could not be found) shown to come from the same source (the *Times*, February 24, 1902). The *innocent* buyer thus dispossessed may, occasionally, get the price he had paid back out of the money found upon the convict. (Where the thief is not caught, or there is an acquittal, the true owner *may* be, and frequently is, able to sue any one who has his property, and when, in the former case, it has got into the possession of the police, there is an easy process for claiming it.) But the court is not bound to make such an order, and often, where stolen goods have been pledged, if the conduct of the pawnbroker has been irreproachable it only orders restitution by him on his receiving some compensation. Or the court may refuse the order if, for instance, it is not sure to whom the property belongs, and leave the claimants to their civil remedy.

It is clear, then, that proceedings against some crimes do end in the victims of them getting some material advantage (though seldom more than they actually have lost), but, at any rate, the indispensable preliminary to any such advantage is a conviction followed by punishment, however slight. The court or the jury must say in every case—not whether they find for A. or B., suer or sued, as in civil proceedings—but guilty or not guilty; they can find for or against the accused, but this does not mean finding against or for *some one* else—as in civil proceedings, for in every criminal case (as we shall see) the State is the accuser, and comes forward *solely* in the interest of justice, and asks *only* for punishment. And if there is a

conviction, some mark of State disapprobation—for the judge, too, represents the State<sup>1</sup>—there must be, however trivial, *e.g.* the accused may be fined a penny,<sup>2</sup> or bound over in his own recognisance<sup>3</sup> to come up for judgment if called upon, or be sentenced to a day's imprisonment, which implies his immediate release, but there cannot be an absolute discharge.<sup>4</sup> For costs as punishment see p. 273.

In the overwhelming bulk of criminal cases, then, we may say that the punishment of the offender is always the first, and nearly always the only consideration. But its mainspring must not be lost sight of: "When a court of justice . . . awards punishment for a breach of the law,

<sup>1</sup> The apparent anomaly of the State appearing before itself constantly recurs, but does not cause the slightest practical difficulty. The "Crown," in *any* legal proceeding, invariably means a Government office—which acts quite independently of the sovereign—and on the very rare occasions when the Crown has a private interest in litigation, it is in exactly the same position as any other litigant before the judges, who are, if possible, even more independent of the Crown than a government department. The Crown as a person, the Crown in its capacity as a suitor, and the Crown in its capacity as a judge, are really three distinct things.

<sup>2</sup> The greatest fine probably ever inflicted was that of £30,000 on the Earl (afterwards first Duke) of Devonshire in 1687 for striking a man in the king's palace. He was imprisoned in default of payment, but escaped, and gave his bond for payment. But he did not pay, and after the Revolution the proceedings were set aside as illegal, and the fine as excessive (*Dict. Nat. Biog.*; 11 State Trials, 135).

<sup>3</sup> A promise to forfeit a certain sum on failure to come and receive punishment for *this* offence, which is only to be exacted in case of future misconduct. Generally, the expedient is a mere formality, and the sum is often beyond the means of the promiser, but occasionally delinquents are thus brought up and imprisoned for the old offence. An instance is mentioned in the *Law Journal*, May 12, 1894 (p. 292), when the judge said that in ten years he had only called upon three such persons.

<sup>4</sup> Except in the very pettiest matters before magistrates, *e.g.* offences by children.

the object is not vengeance. The purpose is to deter": Ex-Lord Chancellor Herschell in *Allen v. Flood*, 1898 A.C., 131. So Pepys tells us (under Feb. 3, 1661) that he heard a sermon by Mr. Thomas Fuller "at the Savoy, upon our forgiving of other men's trespasses, shewing among the things that we are to go to law never to revenge but only to repayre, which I think a good distinction."

It has been seen that some wrongs may be righted, so to say, civilly or criminally. Libel and assault are the commonest instances—the former more often figuring civilly, and the latter criminally—"since they are the crimes least unlikely to be committed by rich people" (though "they are very far from being . . . the only crimes where it is possible" to proceed civilly), because "most crimes are committed by persons so poor that no compensation could be obtained from them."<sup>1</sup> These two examples are from the least serious category of crime (as we shall see); but suppose a case from the most serious. If the crime is charged,<sup>2</sup> the sufferer takes his chance of compensation or restitution (if that be possible), and the State is satisfied by the vindication of the law. But the position is very different if the victim says, "What I want is redress; the State must look to its own revenge. I shall bring my action and get back what I can,"—not ideally public-spirited, perhaps, but very natural. What is the State to do then?

<sup>1</sup> Kenny, *Outlines*, ch. i., who suggests that "the circumstances which give rise to a prosecution for bigamy would often support civil proceedings" for deceit.

<sup>2</sup> When a man was simultaneously charged and sued for assault, the judge said, "It is a rule that the court cannot pass sentence for an assault while an action is depending" for it (*The King v. O'Gorman Mahon*, 4 A. & E. 575, 1836), and declined to do so, though the suer offered to give up his action. It is easy to see how each judgment for the same offence might be affected by the other. (Cf. p. 177 n.<sup>3</sup>).



About 1872, "Mr. Wells instructed his wife to take a quantity of jewellery, including a brooch, to the shop of Mr. Abrahams, and get a substantial loan on the security. The negotiations came to nothing, and Abrahams returned a packet purporting to contain the jewellery. When the packet came to be opened there was no brooch inside, and Mrs. Wells charged Abrahams with having stolen it. Instead, however, of a prosecution for felony, this action was brought against him, and a verdict was found for Wells for £150."<sup>1</sup> After the trial, Wells took criminal proceedings against Abrahams, who asked (in vain) for a new trial on the ground that when the evidence tended to prove a felony as here, the criminal charge must be investigated before a civil action will lie; and though the judges said that the rule<sup>2</sup> was that the civil remedy is suspended till the punishment of the guilty has been sought, still they did not see how that could be enforced, for the judge could not stop the action, he was bound to try it. And in this position the law has been ever since. In 1889 a woman brought an action<sup>3</sup> "for assault and battery" against a man, alleging a shocking offence against her (which he denied); but the judges, far from declining to let the action go on till the charge was tried, refused to adjourn it because a material witness was said to be ill. As the<sup>4</sup>commentator<sup>4</sup> on *Wells v. Abrahams* says, "What is the proper course no one knows."

It was observed (p. 237) that an ideal system would combine (when necessary) both civil and criminal proceedings—as is commonly the case in France—and it ought not

<sup>1</sup> Shirley's *Leading Cases*, *Wells v. Abrahams*, L. R. 7 Q. B. 554.

<sup>2</sup> It is very doubtful: Pollock on *Torts*, 9th edn., p. 205.

<sup>3</sup> *S. v. S.*, 16 Cox C. C. 566, 1889.

<sup>4</sup> Shirley's *Leading Cases*, p. 572, 9th edn.

to be beyond the resources of our jurisprudence to accomplish this. A huge analogous reform was effected when the remedies of equity and of the common law were united in one court, and here and there, as we have seen, it has similarly combined the civil and the criminal. An approximation to this type of thorough legislation is to be found in Acts protecting the funds or other property of Friendly Societies and Trade Unions (the members of which are always poor persons) from misappropriation, for a magistrate may at once order the offender to restore the money or property, and sentence him to pay a penalty (up to £20) and costs, and in default of obedience to any part of such judgment he may send him to prison. Unfortunately, if the defaulter does not obey, and does go to prison, he cannot be sued civilly for the same property.<sup>1</sup> No doubt there must be some limit to unification of this sort. For instance, it would shock good feeling if a man who had murdered the breadwinner of a family, were sentenced in the same breath to die, and to pay damages to his victim's widow and children. But it would be nothing but abstract justice that his estate should contribute to their support, as it would do if the death had been the result of his negligence instead of his crime; indeed, an employer would be so liable, even though he and all his employees were absolutely free from blame (provided there was no wilful misconduct on the part of the workman killed). However, it may be noted that the law is tending more and more in the direction of an "all round" jurisdiction—for the present confided mostly to police-magistrates and justices. When restitution of property dishonestly gotten *plus* payment of the costs of prosecution is ordered we get something like a system of combined criminal and civil

<sup>1</sup> *Vernon v. Watson*, 1891, 2 Q. B. 288.

remedies, but the combination is rare. And there are one or two cases where the court can order compensation for injury or loss or an official may pay it out of a convict's property.

It has, perhaps, been brought out that the distinction between civil and criminal proceedings is purely artificial, and does not correspond to any opposition in human nature or facts. There are some moral wrongs which the law will revenge or redress with the one kind of procedure, some with the other kind, some with both, while there are some which it will not recognise at all,<sup>1</sup> though it will compensate for accidents to workmen, which are not wrongs at all. Any one, then, who thinks himself aggrieved must

<sup>1</sup> And that not only for the reason mentioned (p. 43). There are genuine moral wrongs which the law will not recognise, because they arise entirely from acts which the law either forbids or discourages (on moral grounds), e.g. it ignores dishonourable conduct in betting or gambling. A man who pleads the Gaming Act as his only answer to a claim for a bet or money lost at cards is often flagrantly dishonest. Perhaps the most famous, if not the most authentic, case of this sort occurred (?) about 1725. Everet alleged that he "was skilled in dealing in several commodities, such as plate, rings, watches, etc.," that he entered into partnership with Williams, "and it was agreed that they should equally provide all sorts of necessaries, such as horses, saddles, bridles, and equally bear all expenses on the roads and at inns, fairs, etc.; that they (both) proceeded jointly in the said business with good success on Hounslow Heath, where they dealt with a gentleman for a gold watch; . . . that they went to Finchley . . . and dealt with several gentlemen for divers watches, rings, swords, canes, hats, cloaks, horses, bridles, saddles, etc., that there was a gentleman at Blackheath who had a good horse, etc., to dispose of, which might be had for little or no money, and after some small discourse they dealt for the said horse," and much else of the same sort. Williams declined to account for £2000 thus made, and Everet claimed a partnership account in the usual form. It turned out that both were highwaymen; the suer was hanged in 1729, and his partner in 1735. The costs of the case had, it is said, to be paid by the counsel who signed it, and Everet's solicitors were fined £50 each. One of them was transported for robbery in 1735 (Lindley, *Partnership* (1912) i. 6, sec. 1). Nevertheless, if Everet's story was true, he had a genuine grievance against his partner.

first find out whether the law<sup>1</sup> can give him either reparation or revenge, and next, how to set the law (if any) in motion.

## 46. Classes of Crime

(1) Treason; (2) felony;<sup>2</sup> (3) misdemeanours; (4) police-court or police<sup>3</sup> or petty offences.

This is not a scientific,<sup>4</sup> but a practical division, according to seriousness.

(1) The popular idea about treason is substantially correct, viz. that it is a crime against the State or against the individual sovereign who personifies the State, though it is not so generally known that it includes wrong against certain members of his or her family, and even some of their high officers. Little need be said about it, as, happily, it is phenomenally rare in this country—though there was a trial, conviction, and therefore necessarily sentence to death<sup>5</sup> for it (before the war 1914-8) as late as 1903,—the best-known variety of it, real political perfidy, having

<sup>1</sup> And this is not always easy even for lawyers, as, for instance, in Whitaker Wright's case (1903-4), where both law officers informed the House of Commons that the facts as known to them disclosed no crime. Yet he was ultimately convicted. Whereupon the Government announced its intention to promote a bill to make the particular kind of wrong brought home to him *expressly* a crime. (Cf. p. 38 and p. 44).

<sup>2</sup> The origin of the word is obscure; perhaps it was "a term of obscene abuse" (*New English Dictionary*).

<sup>3</sup> "Police" is here used in the general sense of local or municipal as opposed to State initiative, e.g. keeping a child from school or having a smoking chimney, though no "policeman" may intervene. We shall here call class 4 "offences" simply.

<sup>4</sup> It seems to be agreed on all hands that the distinction between classes 2 and 3 should be abolished or revised at the earliest opportunity.

<sup>5</sup> Lynch's case. The commutation to two years' imprisonment, and the pardon at the end of one, marked officially contempt for this class of treason. Since 1820 of the 19 persons thus sentenced to death only one (Casement, in 1916) was executed. Kenny (1920) C. 31.

been long extinct—since the last agitations of the Jacobites—as is natural in a realm with a good and long-settled government. Nowadays violence to royal personages would be dealt with and punished in the same way as if they were ordinary people. One can hardly imagine Parliament creating a new treason, but the next two classes have been fixed by common law and freely dealt with by Parliament. Most of the law still unrepealed against treason dates from the time when the central authority in the State thought it essential to arm itself with terrible powers against attacks on the royal dignity<sup>1</sup> which was identified with the commonwealth. Hence the least penalty for treason was death; but, as political and other education grew, acquittals became so common lest execution should follow—exactly as they did when less notorious crimes were capital—that at last, in 1848, was invented a species of

(2) Felony, namely, treason felony, the maximum punishment for which is penal servitude for life. Certain notorious Fenians and dynamiters were tried for it.

“Familiar instances of felonies are murder, manslaughter, burglary, housebreaking, larceny, bigamy, rape. Whilst the most conspicuous instances of

“(3) Misdemeanours are less heinous crimes, like perjury, conspiracy, fraud, false pretences, libel, riot, assault.”<sup>2</sup> Murder is the only capital<sup>3</sup> crime in these lists; the rest are

<sup>1</sup> But as early as 1628 it was held no treason “to charge the king with a personal vice,” but a misdemeanour (Pine’s Case, Croke Car. at 126). A personal libel on His Majesty was punished in 1911: *Mylius*.

<sup>2</sup> Kenny, *Outlines*, ch. vii.

<sup>3</sup> But not the only one left, as is generally supposed. (1) Burning or destroying ships of war in dockyards, etc., or military or naval stores, etc., there or in arsenals, etc. (extended in 1918 to Air Force property), or any ship, etc., in the port of London; and (2) piracy (though not amounting to murder), are still punishable by death under Acts of 1772, 1799 and 1837 respectively. “No one under 18 is ever actually executed” (Kenny (1920), C. 31).

commonly punished by imprisonment, though the lesser misdemeanours are sometimes met with fine. Broadly the rules of procedure are the same in all these cases.

(4) Offences. As these are all wrong-doings, not included in the three previous categories, obviously no sort of list can be attempted, and the number of cases is naturally huge (in comparison with those in the other three).

The fundamental characteristic here is, that they are adjudged by the magistrates<sup>1</sup> (without a jury), who derive their powers entirely from statutes. Thus in 1919, the, last year for which the judicial statistics are published, *in addition* to civil proceedings before magistrates, of which there were an enormous number, there were 493,047 charges in England and Wales (or rather, persons charged of whom 40,473 were children tried in the "Juvenile Courts") in this class, as well as 45,658 in the other three classes, and 7,883 charges of those three classes were sent by magistrates to be finally adjudged elsewhere. As *practically*<sup>2</sup> *all criminal cases are begun before magistrates*,

<sup>1</sup> Those paid, who are trained lawyers, sit alone; so do the aldermen of the City of London, who are assisted by expert clerks. Otherwise, of the "great unpaid," two or a majority of more must decide. One alone can only hear trivial cases, and cannot impose more than fourteen days' imprisonment or twenty shillings *including* costs, but he can commit for trial.

<sup>2</sup> Impeachments and informations in the King's Bench are not, but they are so rare that they may be neglected. The last impeachment was in 1806, when Lord Melville was acquitted of malversation as treasurer of the Navy.

The right of a Secretary of State, or any other privy councillor—always a magistrate for every county—to arrest *for treason* and to commit for trial, is of extreme historical interest, but now of no practical consequence.

When a coroner's jury finds "murder" or "manslaughter" (or, in the City of London, where there is a fire inquest, "arson," under an Act, c. xxxviii. of 1888), there is also almost invariably a hearing before a magistrate as well; but there need not be, for the coroner must send the accused for trial, if there is a verdict adverse to him. And where the inquest lasted five days (the *Times*, February 5,

these figures<sup>1</sup> show that a large number of their tribunals are required to cope with the work; and, accordingly, their courts are by far more numerous than courts of any other rank in the kingdom. In town or country, a police-magistrate or a J.P. is never far off. They are the bed-rock of our criminal system, and we must now ascend from these inferior courts to the higher.

#### 47. A. Offences, Civil (or "Quasi-Criminal")<sup>2</sup>

These are generally miniature actions<sup>3</sup> brought by the party aggrieved—often a local authority—and except that the procedure is "summary," i.e. quick, they are in

1880), and it would have been obvious waste of time to go through the same *preliminary* inquiry a second time, the accused was sent for trial, i.e. ordered to be indicted (as he was) only by the coroner—a precedent that might often be usefully followed.

Coroners' juries share with other juries the (partial) abeyance due to the war, it remains (Nov., 1921) to be seen whether they will be restored to their old position: see a speech by a London Coroner in *The Solicitors' Journal*, Dec. 31, 1921.

<sup>1</sup> In 1909 Lord James of Hereford told the House of Lords that there were about 21,000 justices of the peace in England and Wales (*Times*, July 22, 1909). A rough calculation, based on lists in the *County Councils, etc., Companion for 1914*, shows that in 1913 there were about 14,000 justices of the peace for the counties of England (London (not the City) included) and Wales, and about 6500 for the cities and boroughs—doubtless, the same persons' names are in each list in a few instances: there are (1921) twenty-five stipendiary magistrates for London, and seventeen in other populous places.

The institution of the "justice" is traced back to a statute of 1327, but this use of the word—which, perhaps, betrays a popular origin—is much older. As local "notables," the common law of every country must employ them.

<sup>2</sup> So in *Judicial Statistics (Blue Book)* for 1919, p. 39. See p. 248 n.<sup>3</sup>

<sup>3</sup> E.g. "bastardy proceedings, disputes between employers and workmen, claims for poor rates or for contributions due under the Public Health Acts from the owners of house property, for the making of streets or the repair of sewers" (Kenny, ch. xxix.; one estate once paid thus £546. See 1901, 2 K.B. 278).

all respects (including costs and appeals) like other civil proceedings; and, therefore, it need only be mentioned here that they can only end in (1) dismissal, or (2) an order to do something—e.g. to close an overcrowded house, to destroy unsound meat, or to pay a sum of money with or without costs, never in a fine or imprisonment. Parliament shows an inclination to extend this jurisdiction.

## 48. B. Offences, Criminal

We now come to criminal cases, properly so called. We have already (p. 248) had a division of crimes according to gravity; we now meet one according as I. the charge is, and must be, dealt with by the magistrates; II. may be, but need not necessarily (p. 264); or III. cannot be finally determined by them (p. 266). Naturally, the two divisions will roughly correspond.

### I. NOT INDICTABLE.

The first of these categories is by far the most comprehensive, for it "covers some hundreds of offences, e.g. many petty forms of dishonesty or of malicious damage, acts of cruelty to animals, transgressions against the bye-laws that secure order in streets and highways, and trivial violation of the laws relating to game, intoxicating liquors, adulteration of food, revenue, public health, and education."<sup>1</sup>

The magistrates in almost every case (in II. as well as I.) may be as lenient as they like about punishments, but their *severity* is limited. If they find an offence is proved, they may consider it too trivial for punishment, or they may bind the offender over to keep the peace—a mere mark of disapprobation—with or without sureties, or they may

<sup>1</sup> Kenny, ch. xxix.



fine him (and in some cases in a large sum) with or without costs; but they may, if the statute infringed permits, send him to prison with or without hard labour, though never for more than six months (except<sup>1</sup> he be on "ticket-of-leave," when for certain breaches he may be sent for twelve); and if a fine is not paid, they may commit to prison for a definite time, or they may order the money to be raised by distress on his goods; and if that does not produce enough, they may send to prison for three months, or less.<sup>2</sup> Here, then, we meet with the liberty of an accused being at stake—certainly the most prominent feature of criminal law in the popular mind. The first legal physical restraint of that liberty is Arrest:<sup>3</sup> surrender comes to the same thing. Bail implies a promise to return on a future day into the *custody of the law*, which means, with hardly an exception,<sup>4</sup> that of the police.

## 49. Arrest

Who, then, may arrest? Practically no one but the police may, and no one ever does. But there is one momentous exception. Not only any one may, but any one *over age* must "do his best to arrest . . . any person

<sup>1</sup> And except when they inflict *consecutive* sentences (with the maximum of twelve months) for more than one offence, but this is very rare.

<sup>2</sup> And they may even imprison without a distress if they think that the levy "will be more injurious to him or his family" than his incarceration.

<sup>3</sup> It is extremely curious that "all arrest before trial seems inconsistent with Magna Charta" (Kenny, ch. xxx.). At any rate that is not the law now; it was not quite so easy to get away in 1215.

<sup>4</sup> Each House of Parliament has sometimes, but very rarely, a prisoner in the custody of its officials, and so, more often, has the High Court of Justice. Naval or military persons under naval or military arrest are not considered here.

who *in his presence* commits a treason or felony or dangerous wounding," on pain of fine or imprisonment. It seems,<sup>1</sup> too, on ancient authority, that when one of these crimes has been actually committed, a private person *may* arrest any one whom he reasonably suspects of having committed it, and even may arrest any one *about* to commit a crime, till the danger is over. In all cases but the last the captive must be handed over to the police. It may be added that every one is bound<sup>2</sup> to assist the police in arresting, if called upon, and people are occasionally punished for not doing so.

Constables naturally have much wider powers<sup>3</sup> than private persons, especially in the latitude of "reasonable suspicion." It is clear that there must be such a privileged class, not only to revenge crime, but to prevent it. But, on the other hand, such powers are jealously watched, and in many cases not even the police may act without a magistrate's authorisation. For it would be ridiculous to arrest when there is no reason to suppose that the accused, when summoned, will not answer the charge—indeed, when it is trivial, the magistrates may, and often do, dispense with his presence at the hearing. But when it is deemed necessary that he should be there, and, therefore, in all serious criminal charges (and in *any* where, in fact, he has not obeyed the summons), his attendance may be

<sup>1</sup> Kenny, ch. xxx.

<sup>2</sup> As one Brown found in 1841, when a constable called on him to assist in stopping a prize-fight; though his excuse was that he could not leave the four horses of the carriage from which he was looking on and that his help against the assembled mob would have been utterly useless, he was found guilty by a Bedford jury, and fined forty shillings, and ordered to find sureties for good behaviour (*The Queen v. Brown*, C. & M. 314).

<sup>3</sup> It was laid down by Coke in 1616 that a "constable hath as good authority in his place as the Chief Justice of England in his" (1 Rolle's Rep. 238).

compelled by a magistrate's warrant, granted on sworn evidence *only*, to arrest him, which, practically, is valid throughout the whole kingdom (and, in effect, the British Empire). Indeed, when any one is "wanted" for a serious crime, a warrant is issued as a matter of course. But it is a fundamental rule<sup>1</sup> that "if a summons will be likely to prove effectual, a warrant should not be granted, unless the charge is of a very serious nature." The oath,<sup>2</sup> of course, imposes a greater responsibility on the taker.

It is clear, then, that when arrest is necessary or is desired by an aggrieved person—generally the prosecutor<sup>3</sup>—recourse must be had to the police. But innumerable criminal charges are begun by summons. The summons may be obtained from a magistrate, by application made personally or through a representative; or the wrong alleged may be reported to the police, who may decline to interfere on the ground that the matter is too trivial, or that nothing illegal has been shown, and leave the complainer to act for himself, in which case he is quite free to make his application to the magistrate; or they may consider the allegation so grave that they will themselves make application to the magistrate to issue a warrant according to the exigencies of the moment, or they will at once proceed to arrest<sup>4</sup> the accused. But if they do "take" a case "up"

<sup>1</sup> Atkinson's *Magistrate's Annual Practice*, ch. ii.

<sup>2</sup> In the City of London even a (criminal) summons is only granted on oath. Thus a false charge at the outset involves perjury.

<sup>3</sup> A word, with its cognates, almost exclusively—here absolutely—confined to a criminal meaning.

<sup>4</sup> Arrest may be mitigated by bail (from *bailler*—to hand over=*mainprise*), i.e. release on condition of appearing in court: it is said that old records say when a surety could not be found, "Let the prison be his bail." It must be granted by the officer in charge of the station, for small offences, and may be for "even light felonies" (*Police Code*, 1912, p. 18), where there is no warrant, and the case cannot come before the magistrate within twenty-four hours. If

in any of these ways, or, indeed, in any, they make the charge either on the distinct responsibility of the complainant or of their own; the latter in cases of crimes committed, as we have seen, under their own eyes, or in which they have good reason to suspect the culprit; the former when, having no official knowledge through their officers, one person definitely charges another with a crime, e.g. when any one is given into custody in the street. For what allegations a constable will thus arrest "on sight" seems not to be rigidly settled; in these matters the police must use their common sense.

The following general rules, laid down in the Police Code (by eminent police authorities; the edition of 1899 is here cited: subsequent editions are to the same effect, but differently expressed) illustrate these points:—

A constable "is justified in arresting a person against whom a charge of felony is preferred *upon reliable grounds by a responsible individual*. A constable, in whose presence a misdemeanour is committed, may arrest the offender without a warrant, if the circumstances render such a course necessary, and the delinquent is not known. But mere information of the commission of a misdemeanour . . . should not, under ordinary conditions, be followed by arrest, unless a warrant has been obtained.

Application for a warrant is also advisable in all cases where there is any doubt about the guilty party, . . . or if there is any suspicion that the object of the person aggrieved is rather to recover stolen property than to enforce the law" ("embezzlement being often within this

the accused has to find sureties in this *or any other instance*, the police must be satisfied that the persons "going bail" are "good" for the amount, which must be reasonable. The "surety" has been described as a "living prison" (*L'Ancienne Coutume de Normandie*, ch. lxviii. and ch. lxxvi.).

category," p. 237 in 1912 edn.) It seems then, broadly, that the no-arrest limit stops at misdemeanours "in presence." There must, on the whole, be a good many illegal arrests.

But the question, who charges, is of supreme importance, in view of the prevalence of actions for malicious prosecution and for false imprisonment, where an accusation has been heard and dismissed, and it is common in such cases to hear the blame bandied about between the police and some party concerned. But whether it be policeman or civilian, he is liable civilly, unless he had "reasonable and probable cause" for making a criminal charge against the given individual. Thus, in a case<sup>1</sup> in 1870, where one Austin had been locked up all night but discharged by the magistrates in the morning, the judge said, "Mrs. Dowling took it into her head that she had a right to give Mr. Austin into custody, because he broke into a room in the house in order to repossess himself of his own property. In this she was mistaken, for he was guilty of nothing felonious or malicious. . . . He having been so wrongfully given into the custody of a police constable was taken to the police station. But for the subsequent act of Dowling he would not have been detained there. If Dowling had merely signed the charge-sheet, that would not have amounted to more than making a charge against one already in custody. . . . But . . . though Dowling gave no express direction for Austin's detention, he was expressly told by the inspector on duty that he disclaimed all responsibility in respect of the charge, and that he would have nothing to do with the detention of Austin, except on the responsibility of Dowling; the inspector would not have kept Austin in custody unless the charge of felony was distinctly made by Dowling. How long did that false

<sup>1</sup> *Austin v. Dowling*, L. R. 5, C. P. 534.

state of imprisonment last? So long of course as Austin remained in the custody of a ministerial officer of the law, whose duty it was to detain him until he could be brought before a judicial officer. Until he was so brought, there was no malicious prosecution. The distinction between false imprisonment and malicious prosecution is well illustrated by the case where, parties being before a magistrate, one makes a charge against another, whereupon the magistrate orders the person charged to be taken into custody and detained until the matter can be investigated. The party making the charge is not liable to an action for false imprisonment, because he does not set a ministerial officer in motion, but a judicial officer. The opinion and judgment of a judicial officer are interposed between the charge and the imprisonment," and this was held to be a clear case of false imprisonment at least.

What is "reasonable" or "probable" depends on the circumstances of each case, but the anomaly of allowing the initiation of criminal proceedings at the instance of any accuser, without the slightest guarantee of his good faith, or of his ability to satisfy a claim for damages, is inherent in every *civilised* system of jurisprudence, for otherwise the complaints or denunciations of poor persons or those of low station would not be attended to, and many criminals would escape. Our law does, indeed, show a peculiar abhorrence of any abuse of the powers to arrest by allowing process (civil) against even the bench of inferior courts,<sup>1</sup>

<sup>1</sup> A successful action of this sort is very rare, but there was one in 1848. Mr. Smith, who was county court judge in Lincolnshire, allowed Mr. Holden, who resided and carried on business in Cambridgeshire, and who was therefore out of his jurisdiction, as he knew, to be sued in his court, and, when he did not appear, made an order against him for the payment of a certain sum. Mr. Holden took no notice of this order, and was summoned to the Lincolnshire court. He again made default, whereupon Mr. Smith, "*bond fide*

especially magistrates', which it seldom does for any other judicial mistake they may make—and by recognising false imprisonment as a crime, viz. a misdemeanour (generally an assault<sup>1</sup>), but except in circumstances of aggravation, punishment in the latter way is not much in vogue. Perhaps *any* reckless or malicious initiation of criminal proceedings should itself be made criminal and the immunity which—short, at any rate, of perjury—an unprincipled “man of straw” now practically enjoys, be taken away.

## 50. Prosecutions

It is clear that the overwhelming bulk of prosecutions are undertaken by the police at the instance of some

believing he had power to do so,” committed him for “contempt” to Cambridge gaol for fourteen days. He was released by a judge of the High Court (on a writ of *habeas corpus*) and brought an action and recovered £60 damages from the judge, and, though there was an appeal, kept them (19 L. J. Q. B. 170). The judges said that the judge's mistake was one of law, and not of fact, and “we have found no authority for saying that” a judge “is not answerable in an action for an act done by his command and authority, *when he has no jurisdiction.*”

In 1875 a girl, who was ultimately convicted, was, while in charge, examined twice by a doctor. She brought an action for assault, and recovered damages against the doctor and the magistrate and police inspector who authorised the examination, though it was admitted that all three had acted in good faith, but had mistaken the law (13 Cox C. C. 625).

In 1904 a London police magistrate fined a man for not having had two of his children vaccinated; owing to the age of the children the magistrate had no jurisdiction. The fine was not paid, and a distress was levied. The father thereupon brought an action against the magistrate for illegal distress, and recovered (and on appeal retained) £10 damages in a county court (*Polley v. Fordham*, 20 T. L. R. 435, 639).

In 1920 a conviction for perjury was quashed because a court at Peterborough included justices who had no right to sit (*Holdich's* case, 15 Crim. Ap. R. 122).

<sup>1</sup> But not necessarily; relatives who locked an *accoucheur* in the patient's room to ensure his presence were convicted (*R. v. Linsberg*, 69 J. P. 107, 1905).

sufferer. A private prosecutor who, for his own convenience prefers to control the conduct of his case in *any* court, pays all expenses, e.g. for solicitor and counsel (if any), *over and above* those which, as we shall see, the local authority—county or borough—would pay in the ordinary way (out of the rates); but, otherwise, there is not the slightest difference in the procedure or incidents. For it is a fundamental constitutional rule that *all* prosecutions take place in the name of the Crown, on the theory that it is the peculiar duty of the State and not of the citizen to exact punishment (p. 237). But, again, this makes no material difference in the actual conduct of the case *at any stage*. In general, the State is sufficiently well represented by the local authority; but in grave cases—e.g. where the penalty is death, or when the matter seems to be of *special* public interest—the intervention of the Crown is more than nominal; for, acting—as always—through its ministers—here the law officers, the Attorney-General, and the Solicitor-General at the instance of “the Treasury” (which, in such a case,<sup>1</sup> pays out of the taxes), i.e. the Crown represented by the Director of Public Prosecutions, it may prosecute by the mouth of these two officers themselves,<sup>2</sup> or by that of any counsel whom the former of them or the Director may appoint. But even the personal presence of the law officers gives the Crown no privilege (except an unimportant technical one).

And as the State can alone prosecute, so there must be the sanction of the State in some form to abandon a prosecution; the “prosecutor” cannot stop it. “Such a

<sup>1</sup> Or it may do so after a private prosecution, as in Whitaker Wright's case, 1904, in recognition of public service rendered.

<sup>2</sup> In the proceedings against Dr. Jameson and others for the “raid” in 1896, the law officers appeared at the Bow Street Police Court.



person may be the sole victim of the crime; he may even have taken the trouble to commence a prosecution for it; yet these facts will not give him any power of final control over the proceedings, and no settlement which he may make with the accused offenders will afford the latter any legal immunity. The prosecution which has been thus settled and abandoned by him may at any subsequent time, however remote, be taken up again by the Attorney-General, or even by any private person. Thus . . . a man had begun a prosecution against the keeper of a gaming-house, and employed a particular solicitor to conduct the proceedings. He afterwards changed his lawyer, and subsequently arranged matters with the defendant and dropped the prosecution" [without obtaining the leave of the court]. "Thereupon the original solicitor took it up and brought it to trial. The former prosecutor protested against this activity, but in vain. The Court of King's Bench insisted that the case must proceed."<sup>1</sup> But there is not the same objection to the *State's* representative stopping criminal proceedings, and the Attorney-General may stop any,<sup>2</sup> or allow or compel a private prosecutor to do so. The latter, of course, may be allowed to do so by the court—*any*—if it does not suspect collusion,<sup>3</sup> or if there is

<sup>1</sup> Dr. Kenny, ch. i., cites here *The King v. Wood*, 3 B. & Ad. 65 (1832), which followed a precedent of 1823. There, too, is mentioned that a justice, having been convicted of a misdemeanour in the exercise of his office, as the private prosecutor did not proceed to obtain judgment, the Attorney-General did, and he was sentenced (1826).

<sup>2</sup> As he did after the second abortive trial in the Peasenhall murder case in 1903. It is not clear whether a defendant can insist on being tried (on the ground, e.g. that he desires a *verdict* of not guilty).

<sup>3</sup> In the Divorce Court, where such corrupt bargains are most likely, the court constantly interferes. All contracts to stifle prosecutions, at any rate for felonies and misdemeanours, are illegal

not some public reason (if the expression may be used) against such a course.

## 51. The Hearing before Magistrates

### PROCEDURE—EVIDENCE.

The actual hearing in all criminal courts is conducted on the same principles and in much the same order as those described under civil proceedings—with a few technical differences in the order and number of speeches of parties (or their advocates). Solicitors may appear in police courts. The rules of evidence, too, are the same; indeed, many of the examples given (pp. 188, 194, 210) have been taken from criminal procedure, to which *only* some of them refer. As the gravity of a crime may often depend on the character of the doer, magistrates are always informed of any previous convictions against the accused, though in view of the procedure elsewhere (see p. 292), it is anomalous that they should get this information before they have made up their minds whether to convict or not on the particular charge before them. When they send the case to another court, their knowledge of the accused's antecedents cannot affect

and unenforceable, even if made with the sanction of the judge (i.e. "such an agreement can give rise to no civil right, and no action can be brought upon it": 9 Halsbury's *Laws of Eng.*, 504: *Windhill*, etc., v. *Vint* 45 Ch. D. 351, 1890, C.A.); and "compounding" a crime is punishable, e.g. advertising a reward for stolen property with the promise that "no questions will be asked." Magistrates often exercise their power of refusing the withdrawal of a prosecution (especially if they suspect compromise). Thus, in 1863, after a summons for assault, the parties made it up, and one assailant paid the assaulted £1; neither appeared on the day fixed, and, though the justices knew what had passed, they issued a warrant to arrest the accused: one was arrested, and bail refused. Ultimately both were fined £1, though the prosecutor desired to withdraw from the case. The judges held that the magistrates were within their rights (*ex parte Bryant*, 27 J. P. 277, 289). Superior courts, of course, have the same right.

this trial, and it is, in such cases, mostly that previous convictions tell. Still, it would perhaps be as well if magistrates were only informed of previous convictions after they have made up their minds on the facts independently.

## 52. The Decision

Once before the court, the accused may be charged with any crime, whether greater or smaller than that already preferred, if the evidence discloses good grounds. In any case, the first thing the magistrate has to do is to determine in which of the above classes (p. 252) the charge falls. So far we have only touched on I.; II. and III. refer without exception to Classes 1, 2, 3 of Crimes (p. 248).

### INDICTABLE OFFENCES.

Now it is essential to note that these are all *indictable*, i.e. they may all be, and some must be, tried by a jury. Lawyers themselves are not always sure whether a given wrong-doing (especially if it be modern) is indictable<sup>1</sup> or not, but, generally, the matter is quite clear, and magistrates know what crimes they *may* deal with and what they must not.

## 53. Dismissal

They may, of course, dismiss *any* charge, and in Class I., their special domain, their decision is final (and, indeed, it is very seldom that an accused dismissed thus on *any* charge is again brought up on the same charge, though in Classes 1, 2, 3 (p. 248), this may be *possible*). For it is a

<sup>1</sup> E.g. falsifying the list of voters by an overseer was held not to be (*The Queen v. Hall*, 1891, 1 Q. B. 747).

fundamental rule that if a charge has been investigated and determined *on its merits*,<sup>1</sup> no one can be imperilled a second time *in any court* in respect thereof. Thus, when a bench fined a driver on one day for "wilful misbehaviour" in striking a horse on which a lady was riding, whereby she was badly hurt, and on another under another statute, for assaulting her on the same occasion, fined him again, the second conviction was quashed.<sup>2</sup> And so, had the first charge been dismissed on its merits, the second would have been invalid.

## 54. Indictable Offences Tried by Magistrates

CLASS II. (p. 252).

Originally magistrates could only deal with non-indictable offences (p. 251 and p. 252). Gradually, since 1847, apparently,<sup>3</sup> their jurisdiction has been extended till "nine-tenths of all the trials for indictable offences" (including even some felonies) "now take place thus."<sup>4</sup> The chief Summary Jurisdiction Act (1879) provides that on specified charges<sup>5</sup> the court may, if it thinks fit, "having regard to the character and antecedents of the" adult

<sup>1</sup> Which is not the case if a jury disagree, nor if the dismissal takes place owing to a technicality, as where a man was summoned for drunkenness, and it appeared that the summons had been obtained by one who had no authority to obtain it, the justices dismissed the charge, but allowed the proper person to bring it again, and it was held that they were right, and they ultimately convicted (*Foster v. Hull*, 33 J. P. 629, 1869).

<sup>2</sup> *Wemyss v. Hopkins*, L. R., 10 Q. B. 378, in 1875.

<sup>3</sup> Stephen's *History of the Criminal Law*, ch. iv.

<sup>4</sup> Kenny, ch. xxix. (1920).

<sup>5</sup> All, practically, crimes against property which is not of the value of more than forty shillings. Morally, no doubt, that "it was such a little one" is no defence; but, practically, magistrates can do ample justice in such small cases.

"person charged, the nature of the offence, and all the circumstances of the case, and if the person charged . . . when informed by the court of his right to be tried by a jury, consents to be dealt with summarily" (sec. 12), deal with the case itself. The immemorial respect of the Common Law for trial by jury as the "palladium" of personal liberty is here conspicuous, for there are careful provisions before the accused surrenders his right and consents to be tried by a few justices or even one magistrate, that he shall understand what he is doing, for a magistrate must explain that he need not answer or plead guilty or not guilty if he does not like, that if he does not he will either be discharged<sup>1</sup> or committed for trial, and if the latter, to what court he will be committed, that if he pleads guilty, he will be sentenced there and then, or very soon, etc. The necessary<sup>2</sup> consent is usually given readily in order to avoid the risk of imprisonment whilst awaiting trial, and of receiving a severer sentence than it is possible for magistrates to inflict.<sup>3</sup> Hence, so to say, the popularity of this procedure (p. 264). In the case of children,<sup>4</sup> for whom the proper guardian must give the necessary consent, the magistrates' powers of trial are still wider, and that of punishment, though otherwise beneath their normal limit, includes, in the case of a boy, whipping. If the crime is of the specified kind, but the value of the property in question over the forty-shilling limit, then, though the magistrates may conclude that it is a case they could send for trial,

<sup>1</sup> In which case the rule about class I., p. 263, applied; he is (as good as) acquitted.

<sup>2</sup> Kenny, ch. xxix. (1920), "about four times as many such crimes are" thus "tried as are tried by actual indictment."

<sup>3</sup> I.e. a maximum of three months' imprisonment or a fine of £25.

<sup>4</sup> The Children's Act, 1908, is a code for offences by and against children.

yet, if taking everything into consideration, they think that six months' imprisonment (or less) is adequate punishment, after all the precautions just detailed, they must call upon the accused to plead guilty or not guilty, and if he pleads guilty, they may "give" him anything up to the six months, with or without hard labour.

But so enamoured is our law of trial by jury that even the charge of an offence (Class 4, p. 248)—not being an assault (which is usually not a very serious matter)—which may entail three months' imprisonment,<sup>1</sup> entitles the accused if he likes—and many do so—to be tried by jury.

## 55. Indictable Offences not Triable by Magistrates

CLASS III. (p. 252).

The gravest crimes are not, of course, punishable by magistrates; no one would propose that death or penal servitude should be inflicted without the concurrence of a jury. Here the function of the magistrate is to inquire whether there is a *prima facie* case against the accused; and they may come to the conclusion that there is not, and then they must discharge. But as here they have no power to determine the case on its merits, an accused may, if fresh evidence comes to light, be brought before them again<sup>2</sup> on a preliminary inquiry into the *same* charge.

<sup>1</sup> E.g. forging a trade-mark; keeping a betting-house.

<sup>2</sup> As, for instance, in the Road murder, June, 1860, the criminal was discharged by the magistrate, and in 1865 was again charged and ultimately convicted.

This case is a reminder that there is no prescription for crime (at common law: by statute there is for some serious offences and many trivial ones). But in practice the theory is only acted on in grave instances. Thus Charles Ratcliffe, brother of the Earl of Derwentwater, convicted of high treason in "the '15," escaped and was not

But even though the magistrate dismisses the (indictable) charge, the prosecutor may still go on and occasionally does with success—in a way we shall see (p. 280), for it is to the public interest that such serious charges should be probed to the bottom, i.e. be determined by a jury; but in those “which experience shewed to be most frequently made the subject of false accusations,”<sup>1</sup> viz. perjury, conspiracy, obtaining by false pretences, indecent assault, keeping a gambling or disorderly house (and some others), the prosecutor may, in effect, insist before the magistrate that the case shall be sent for trial with the usual incidents of such a committal, and if he does not so insist, he cannot go on. But if the accused is acquitted, his accuser—as is only fair—may have to pay all his costs.

## 56. Committal for Trial

The magistrate who does not dismiss or determine a charge must send it for trial; in effect, he orders an indictment to be prepared. And he does it by “binding over”

caught till 1745; he was executed in 1746: his plea that he was not the convicted man was tried: 1 *Wilson*, 150. Ex-Governor Wall was tried at the Old Bailey in 1802 for the murder of a man at Goree (by flogging as a punishment for mutiny) in 1782; soon after he was charged in England, but the proceedings were dropped: in 1784, on fresh evidence, they were revived, and he fled, but in 1801 he surrendered and was convicted and executed. In 1830 one Clewes was indicted at Worcester for a murder in 1806 of one Hemmings, who, it was suggested, had helped Clewes to murder another man in 1806, and whom, therefore, Clewes wanted “to put away”; Hemmings’s body was not discovered till 1829: not guilty (4 C. & P. 221; p. 194 n.<sup>1</sup>). “At the Derby Winter Assizes in 1863,” says Fitzjames Stephen (2 *Hist. Cr. L.* 2), “I held a brief for the Crown in a case in which a man was charged with having stolen a leaf from a parish register in 1803”; bill thrown out. Some psychologists think that after these lapses of time a man is *not* the same man (though not quite in Charles Ratcliffe’s sense).

<sup>1</sup> Kenny, ch. xxxi. (1920).

the prosecutor<sup>1</sup> and all the witnesses to the facts on *both* sides in penalties to attend at the trial and give their evidence. But persons accused of indictable crimes (comparatively) rarely call witnesses before the magistrates. The Poor Prisoners' Defence Act of 1903 (p. 293) encourages them to do so, but its effect is insignificant. The trial must take place either at assizes<sup>2</sup> or quarter sessions (p. 277). For some crimes, the magistrate has an option where they shall be tried; but some must go to assizes, where *all* crimes are triable. Quarter sessions may not try certain specified crimes, the list of which is too long to set out, but which are thus summed up: "(1) Such felonies, other than burglary,<sup>3</sup> as are punishable on even a first

<sup>1</sup> Occasionally there is an amusing struggle to prosecute. In 1888 a woman charged her husband with assault, and the magistrates on committing him for trial "bound over" a constable to prosecute—a common practice. On his behalf counsel was retained at the trial, but the wife, too, had retained solicitor and counsel. The judge ordered the prosecution to be conducted by the wife's representative, as those of "the person interested," so that she would receive the costs allowed (*The Queen v. Bushell*, 16 Cox C. C., 367). It is generally advisable to bind over "the person interested."

<sup>2</sup> Peers are tried for treason or felony by the House of Lords (which forms the jury), because every man is entitled by Magna Charta to be tried by his "peers" in rank, for "the great are always obnoxious to popular envy" (1 Blackstone, 401). But, historically, it seems this has nothing to do with trial by jury, which came in later, by which time, apparently, the barons had (tried and) failed to get the same right in civil causes and misdemeanours (1 Pollock and Maitland, p. 152 and p. 392). Originally, probably there was no need to concern themselves about any charges but treasons (and certain felonies). But even in these cases, till indictment presented, the procedure is identical. But as such trials are naturally very rare, the subject is not worth pursuing. In 1692 Knollys, "commonly called the Earl of Banbury," was charged with murder (in a duel); as the Lords and the King's Bench could not agree whether he was a peer, he was not tried at all.

<sup>3</sup> But "grave or difficult" burglaries must go to assizes. (But less than a third now go there, Kenny, ch. xxviii.) Q. S. for Peterborough claims a much wider jurisdiction than other Q. S.: see *R. v. Holdich*, 15 Cr. Ap. R. 122, 1920, for the interesting antiquarian and archæological grounds.



conviction by penal servitude for life or by death; (2) certain specified crimes which, though less grave than those already enumerated, are likely to involve difficult questions of law, e.g. . . . forgery, bigamy, . . . perjury, libel, . . . misappropriation by bankers, agents, and trustees."<sup>1</sup> Hence it is not surprising that "Quarter Sessions of counties and boroughs try more prisoners than the Assizes and the Central Criminal Court together."<sup>2</sup>

Whither, then, does a magistrate send a case for trial, if he has a choice? As a general rule, to the court<sup>3</sup> which will try the case earliest. If there is little to choose in point of time between assizes and quarter sessions, then to the latter, so as to relieve the judge, who is always wanted elsewhere. But this general tendency is often modified by the gravity or heinousness of the crime, by the bad antecedents of the accused, or even by the magistrates' knowledge of the local chairman of the quarter sessions (who naturally, if a layman, does not, as presiding judge, inspire such confidence as a lawyer) in the direction of preferring assizes. There is, perhaps, some justice in the theory that the worse the criminal, the higher should be the tribunal condemning, as there is some natural jealousy of any one but a High Court judge wielding the dreaddest dooms of the law. It must, however, happen occasionally that the nearest assize is three, four, or five months off,<sup>4</sup> and the

<sup>1</sup> *Ibid.*

<sup>2</sup> *Ibid.* (1920).

<sup>3</sup> Of course to the court locally proper, magistrates in Somerset cannot commit to assizes or sessions in Northumberland (pp. 277-8).

<sup>4</sup> Probably some remedy will be found soon. Perhaps the State ought to compensate an acquitted person for *undue* delay in trial as the State is to blame. Moreover, long detention unnerves a *prisoner*, and thus and in other ways impedes the defence. Occasionally, however, great despatch is possible. Thus, a woman was injured on October 14, 1903, and died on November 16, on which day took place the coroner's inquest and the magistrates' hearing.

nearest quarter sessions three, and the accused persons waiting trial may therefore be in prison all that time. This is a great blot on the present system, despite the provision that any one committed to quarter sessions, and for any reason not tried thereat, must be tried at the next assizes. The only substantial mitigation of such a hardship is an indulgent allowance of

## 57. Bail

The magistrate naturally has greater power in this matter than the police (p. 255 n.<sup>4</sup>), and may, if the hearing before him is prolonged from day to day, grant the accused bail on each occasion; on a committal for trial, he always may till the trial (except for treason<sup>1</sup>), and, in some cases, must. His discretion will, of course, be exercised according to the gravity of the case—thus bail is very rarely granted on a charge of murder<sup>2</sup>—and largely according to the likelihood of the accused surrendering to take his trial. And if he

On the 17th, the grand jury at Hertford Assizes returned a true bill for manslaughter against her assailant, and he was convicted and sentenced on the 19th (*Pall Mall Gazette*, December 3, 1903, which also cites a case where a woman arrested at Bristol was sentenced at Exeter Assizes within twenty-four hours of her arrest, all the ordinary stages having been completed). Bellingham, who shot Mr. Spencer Perceval on May 11, 1812, was hanged on the 18th, but such haste would nowadays be considered indecent. In 1863 a man committed a murder on Sunday, December 13. He was taken before the magistrate on the Monday, confessed his guilt, and was sent for trial on the 15th. A true bill was found against him, and he was sentenced to death on his own confession on the 16th (*Annual Register*, 1863). Cf. p. 44 n.<sup>3</sup>.

<sup>1</sup> Which is only bailable by a Secretary of State or a judge.

<sup>2</sup> But in the old cases of duels it often was, when the crime was regarded as more or less technical (*Ex parte Barronet*, 22 L. J. M. C. 25, in 1852).

grants bail, he may, if he likes, dispense with sureties<sup>1</sup> (p. 256 n.). The cases in which bail is compulsory are the less serious misdemeanours, and in these, and generally, if the accused cannot find surety at the moment, he may at any time before trial. The amount fixed must be "reasonable"; to demand excessive or to refuse proper bail with a corrupt (e.g. a political) motive, is an indictable offence on the part of the magistrate.<sup>2</sup> At any rate, judges have spoken very strongly on the apparent reluctance—chiefly in country places—to grant bail, and to grant it sufficiently low. Yet "experience shews that . . . only about one in every thousand"<sup>3</sup> admitted to bail fails to appear. Nevertheless in 1919, 8263 persons were committed for trial, of whom

<sup>1</sup> "In suspicious cases the names of persons tendered as sureties may be required to be furnished in advance, in order that the prosecutor or the police may make inquiry about their character and means. Twenty-four hours', and even forty-eight hours' notice of bail is frequently required. The sureties are bound to answer on oath about their position and liabilities, and the sufficiency of their property to meet their recognisances. It is not usual to accept as bail persons who are not householders; and the practice of accepting the defendant's own solicitor as surety has been condemned as highly inexpedient, if not improper. Proposed sureties should not be rejected if the money qualification is satisfactorily established" (Atkinson, *Magistrate's Annual Practice*). Sureties must not be indemnified against loss; any such bargain is illegal. Apparently, there is no objection to an accused depositing the amount he is bound in, and this was done in a case (mentioned in the *Times*, April 25, 1895) where the sum—£1000—was forfeited. Sureties, who fear their man will abscond, can release themselves by giving information.

<sup>2</sup> Thus, when in 1843, the magistrates of Staffordshire showed great energy in putting down riots and disturbances about Dudley, but two of them refused to take two substantial town councillors of Birmingham as bail (£100 each) for an accused, on the ground that they sympathised with Chartism, they were sternly reproved by the Queen's Bench, and ordered to pay the costs of a proceeding against them (*The Queen v. Badger*, 4 Q. B. 468).

<sup>3</sup> Kenny, ch. xxx. (1920); in 1919, 39 persons charged with indictable, and 604 with non-indictable offences, absconded.

only 3030 were on bail<sup>1</sup>; acquittals *on indictment* were 1625.<sup>2</sup> However, there is an appeal to a judge of the High Court.

A case in 1876 (the *Times*, November 20, *Scott-Jervis's* case) illustrates some of these points. A man charged with obtaining credit by false pretences was admitted to bail in £750 by the magistrate, and his solicitor accepted. He attended at his trial till the last day, when he went abroad. The jury disagreed, but the judge issued a warrant for him, and on his return he was arrested. Application was then made to the Queen's Bench for bail. "As it is a misdemeanour," said the Lord Chief Justice, "I am afraid he is legally entitled to it. If we had an option, we certainly should not exercise it in his favour." On learning that the recognisances had not been estreated,<sup>3</sup> because no blame attached to the bail for his flight, the judge went on, "What does that matter? One of the great reasons for taking bail is that there is a belief that, whatever may have been the delinquencies of the accused, he will not be such a scoundrel as to leave his bail in the lurch; and unless the recognisances are estreated, it will be easy enough for any one to get bail, for it will be understood that they will not have to pay. In my opinion the recognisances ought to be estreated. What is the use of bail unless the bail are to be held responsible?" And the court fixed the bail in two sureties of £750 each, and the accused himself in £1500, and protested against the solicitor being accepted.

<sup>1</sup> *Blue Book for 1919*, pp. 56, 57. The figures of bail for non-indictable offences are not given, but there were 397,149 such convictions (153,776 discharges, and over 28,000 "deserters"); of these 143,814 were *apprehended*; of those convicted only 26,159 were sent to prison.

<sup>2</sup> P. 27 *ibid.* But the *Blue Book* does not state how many of the 7883 tried on indictment were on bail (p. 27).

<sup>3</sup> I.e. the stipulated amount had not been demanded. It is exacted by distress on goods and chattels if necessary.

## 58. Costs

In purely civil cases (under A, p. 251) the general rule is that the loser may be ordered to pay costs to the winner.

In criminal cases (I., p. 252) the rule is the same; if the fine is small, the costs may easily exceed it. Persons sent to prison are very rarely condemned (or able)—nor, indeed, are they in the higher courts—to pay costs as well. Otherwise the prosecutor recovers them with and just as the penalty (p. 253). If the prosecutor has to pay costs—which is rare—though there may be a distress, the procedure generally is civil.

In classes II. and III. (pp. 264, 266) the matter is now dealt with by statute,<sup>1</sup> on the principle that after a trial of an *indictable* offence, whether by magistrates or by a jury, in a *proper* case, as the Court shall determine, either “side” shall pay the costs of the other (as well as its own), or such part of them as is not paid out of a public—county or borough—fund (e.g. those of the witnesses, counsel’s fees, etc., in the great majority of cases). Of course in the great bulk of convictions it is not worth while to order the defendant to pay the costs of the prosecutions, but the power is freely used against defendants who can afford to pay.<sup>2</sup> There are, comparatively, so few private prosecutors that the converse order is seldom made. But it may be made, especially if “the charge was not made in good faith.” Costs allowed by magistrates are generally a lump sum, calculated according to the circumstances and

<sup>1</sup> The Costs in Criminal Cases Act, 1908.

<sup>2</sup> E.g. a misdemeanant in 1909 was sentenced not only to imprisonment with hard labour but to pay between £2000 and £3000 costs (*Kenny ib.* c. 7), but the conviction was quashed (2 Cr. A.R., 228).

exigencies of the case<sup>1</sup>; but when witnesses are bound over in indictable charges, the expenses of each (at *both* hearings) are paid, according to a fixed scale, in the court of trial, where, indeed, there are (comparatively) seldom any other witnesses for the prosecution,<sup>2</sup> though there are, commonly, for the defence. The fixed scales of remuneration<sup>3</sup> aim at repaying reasonably prosecutor and witnesses (on *both* sides) "for the expense, trouble or loss of time properly incurred" in attending; thus a dock-labourer would not get as much for the loss of a day's work as a doctor. But in a proper case costs may be disallowed.<sup>4</sup> And there is power to reward anyone for energy in arresting criminals (not beyond £5 at Q. S., but a judge of assize may award more<sup>5</sup>), and there may be an allowance to the

<sup>1</sup> The highest known are stated (*Encyclopædia*, "Costs," p. 512) to be £300, in a long prosecution for a nuisance.

<sup>2</sup> Which usually calls all its witnesses before the magistrate, and must give notice of any fresh evidence to the accused before the trial.

<sup>3</sup> In 1904 the *ordinary* maximum was fixed at seven shillings per day and five per night. Expert and professional witnesses might get much more; working people, etc., got less. All got reasonable travelling allowances. (*Statutory Rules and Orders*, 1904, p. 117.) The Home Office explained that the scale was expressly fixed in view of there being no title to "any remuneration in the strict sense," for "it is a primary duty incumbent on every citizen to assist the course of criminal justice." (See p. 80 and cf. 73 n.<sup>2</sup>.) In 1920, in view presumably of the rise in prices, the *ordinary* scale was raised by 100, and the other scales by 50 per cent. (*Statutory Rules and Orders*, 1920, p. 446).

<sup>4</sup> As they were in 1823, when an accused was acquitted at Worcester Assizes of stealing two eggs. The judge was informed that the "magistrate (the Rev. Lord Aston) had felt it his duty to bind over" some one "to prosecute." "If," replied the judge, "the magistrate felt it his duty to bind you over to prosecute, I feel it mine not to charge the county with the expenses of such a prosecution" (*Rex v. Powell*, 1 C. & P. 96). The costs of an *unnecessary* witness or of one manifestly untruthful may be disallowed, i.e. the public fund does not pay them.

<sup>5</sup> Thus a man in 1851, who was murderously assaulted while in bed by two armed burglars in his sister-in-law's house, but nevertheless fastened them in from the outside until they could be secured, was awarded ten pounds (*R. v. Dunning*, 5 Cox C. C. 142).

widows and families of persons killed in endeavouring to make such arrests.<sup>1</sup>

## 59. Appeal from Magistrates

With very few exceptions, there is no appeal from dismissal by a magistrate. But there is from a conviction—since 1914—in every case where the accused “did not plead guilty or admit the truth of the information.”

The appeal is (practically) to quarter sessions,<sup>2</sup> and when the necessary formalities are completed, order or sentence is suspended till the appeal is decided.

These are the only ways an accused or sued party can review a magistrate's decision as *of right*. But the court may, and commonly does, if it has any doubt on the law applicable, at the instance of *either* party, “state the case” with its own view for the opinion of the High Court,<sup>3</sup> which will then direct the magistrate on the law; and if he refuses to state the case, will compel him to do so, if it thinks that the point of law is arguable. Thus, when a board-school

<sup>1</sup> E.g. £233 15s. od. was awarded by the judge at the Central Criminal Court to the widow and children of a man so killed by one *Platel*, who was found guilty of murder, but insane (*Law Journal*, May 30, 1903).

<sup>2</sup> But matrimonial *litigation* under an Act which makes the magistrate a sort of inferior judge of divorce goes to the Divorce Division. “Though the yearly total of summary convictions is over 400,000” there are only “since the Act of 1914 about 300” appeals to Q. S. “It may safely be estimated that there is only one appeal to Q. S. for every 1000 convictions” (and though the expense may be partly the cause of this) as “less than half . . . are entirely successful,” this is “noteworthy evidence of the satisfactory working” of these courts (Kenny, C. 29, 1920).

<sup>3</sup> The magistrates, who have no personal interest, do not generally appear to support their opinion; if they do, they may have to pay costs, as when they failed to convict a vendor of adulterated milk at the instance of the police, and were held to be wrong (*Heywood v. Whitehead*, 76 L. T. 781, in 1897).

master was summoned for an assault in detaining a child half-an-hour to learn a lesson, and for touching its head with his hand, though no pain was alleged, justices dismissed the charge as frivolous, and declined to state a case, but they were ordered to do so (and to pay costs) on the ground that there was a genuine point of law to be argued, viz. the legality of the assault or detention.<sup>1</sup> An appeal of this sort is naturally almost always on a point of law; it does not touch the question of severity of sentence, which is not a matter of law and cannot be raised at all by appeal, though, of course, if quarter sessions allow the appeal, the sentence goes too, or, if they affirm conviction, they may mitigate sentence. But if a sentence was absolutely illegal, as, for instance, if a magistrate ordered eighteen months' imprisonment or a term of penal servitude, or even inflicted hard labour in default of payment of a fine, when the Act<sup>2</sup> only authorised imprisonment, or did anything equally patently wrong in law on the face of it, e.g. convicted for certain offences not reported to them within six months of the occurrence, the King's Bench would "pull them up" promptly by divers means (p. 275). And there is ample machinery whereby that court is moved to stir them to do any of their duties, when omission is rightly alleged against them, as, for instance, when they have wrongly declined to hear a case, believing they had no jurisdiction. Nevertheless, statistics form a wonderful tribute to the rectitude and intelligence of our magistrates as a body (p. 275 n.<sup>2</sup>).

<sup>1</sup> *The Queen v. Watson*, 48 J. P. 149, in 1884.

<sup>2</sup> In *The Queen v. Slade*; *ex parte Saunders*, 64 L. J. M. C. 273, in 1895, a clerk, by an oversight, had left in the words "there to be kept to hard labour," and the magistrate had signed the document. Though Saunders had paid the fine, so that no question of imprisonment could arise, the judges quashed the conviction on the ground that he might have paid from fear of hard labour.



According to the authority there cited, the yearly average of *this* kind of appeal (to the High Court) is about 100, and half are unsuccessful. (But it must not be forgotten that these proceedings are *too* costly.) This writer's conclusions in favour of these tribunals cannot be gainsaid. No other nation<sup>1</sup> possesses this invaluable institution. Their services are much more conspicuous in the counties than in the great towns, but English public life is inconceivable without them.

We now arrive at

## 60. Assizes and Quarter Sessions

An assize<sup>2</sup> court is presided over by a judge of the High Court, the "red" judge, as he is popularly called, from his robe (or, if there is a pressure of work, by a commissioner, who is generally an eminent King's Counsel), held at a fixed, usually the county, town in each county, or an important centre in it, two or three or even four times a

<sup>1</sup> But in 1819 (May 28) Rush, the U.S.A. Minister here, writes, "The same kind of magistracy prevails in the State of Virginia where respectable and independent citizens discharge the duties of justices of the peace without pay or reward" *A Residence at the Court of London*, 1845.

<sup>2</sup> Literally, an assembly. The "circuit system" has long been the subject of controversy, for judges are periodically taken from London, where there are always arrears of civil business, to assize towns, where, very often, there is very little of any sort, and sometimes none. "Mr. Justice Walton . . . lately journeyed to Presteign where there was not a single cause or prisoner for trial" (*Law Journal*, February 6, 1904). "Mr. Justice Bucknill will leave to-day for the assizes at Oakham, at which place there are neither causes nor prisoners to try" (*The Standard*, February 18, 1904). Reform, perhaps, will move in the direction of entrusting to local judges (recorders, chairmen of quarter sessions, commissioners, etc.) the less serious criminal work, so that a judge would only be sent for to try the graver charges (if any) or civil causes (unless the latter, or some of them, are handed over to the county court judge of the district); this scheme is known as "Sir Harry Poland's."

year, according to the populousness of the county, when the criminal business (and almost always the civil<sup>1</sup>) ready for trial *in that county* is taken; two such courts may, if there is enough business, be sitting at the same time.

In London the Central Criminal Court (in the Old Bailey) is at once the assize court and (criminal) court of quarter sessions for the City of London, and the assize court for Greater London—in its widest geographical sense; it has twelve sessions a year, and four judges constantly sit simultaneously, i.e. a High Court Judge, or occasionally two, and some or all of the City<sup>2</sup> judges, viz. the Recorder, the Common Serjeant, and the judge of the City of London Court. The jurisdiction of the court always embraces Middlesex, the suburbs of London in Essex, Kent, and Surrey, and may reach to parts of all the home counties at certain times of the year. As it normally draws upon a population of over six millions, it is naturally the most important and probably the busiest criminal court in the world. Its business is purely criminal.

Quarter sessions were originally, and still in nearly all cases are, quarterly meetings of the magistrates of a county or of a borough to transact the business, criminal and other (but very little civil litigation), of the county or the borough respectively. In the county of London (which does not include the City), owing to its populousness, the work is divided between two courts,<sup>3</sup> both presided over by two

<sup>1</sup> I.e. High Court, practically King's Bench Division work. Since 1920 divorce causes may be heard at assizes, but so far (1921) nothing has been done.

<sup>2</sup> Who sit in the court of justice which the City is privileged to possess—viz. the Lord Mayor's Court, now amalgamated with the City's County Court (as it would be called elsewhere).

<sup>3</sup> Where "one-fifth of all the persons indicted in England and Wales" are tried: Kenny, ch. xxviii. (1920).

(paid) lawyer judges, who sit simultaneously every fortnight. Its area is that of the county of London, i.e. that administered by the London County Council. In other towns (i.e. boroughs which have quarter sessions) a recorder, a (paid) lawyer, is judge, but in the counties an unpaid and, generally, a lay chairman<sup>1</sup> merely presides.

Both these tribunals have these same features, viz. (1) the grand jury, (2) the (petty) jury, (3) advocates, if any, must be barristers.<sup>2</sup> And *civil* appeals are, broadly, like other civil appeals (pp. 119, 120). The rules of procedure and evidence are those already outlined.

<sup>1</sup> Except where two or three populous counties have salaried chairmen; Kenny, *ibid.*, who proceeds, "It is a singular paradox that our constitution should permit trials (not merely for petty matters of police, but) for charges that seriously affect men's character and liberty, to be conducted by persons who, however honourable and eminent, are legally untrained, whilst it requires a civil suit for the smallest ordinary debt to be heard before a professional lawyer." Campbell, afterwards Lord Chancellor, wrote in 1810 of a chairman of quarter sessions, "He knows just enough of law to pervert his understanding" (*Life*, ch. ix.). But these country gentlemen—naturally—vary very much in attainments. Literature used to abound with satires on local justices, and the difference of tone to-day is some measure of progress. Thus, in 1751, Fielding, who ought to know, says of "Jonathan Thrasher, Esq.," a magistrate for Westminster, "I have been sometimes inclined to think that this office of a justice of the peace requires some knowledge of the law . . . as these laws are contained in a great variety of books, the statutes which relate to the office of a justice of peace, making of themselves at least two large volumes in folio, and that part of his jurisdiction which is founded on the common law being dispersed in about a hundred volumes, I cannot conceive how this knowledge should be acquired without reading, and yet certain it is Mr. Thrasher never read one syllable of the matter" (*Amelia* B. 1 c. ii.).

<sup>2</sup> "In remote places, where barristers do not attend," said a judge in 1831, "the other branch is permitted to act as advocates" (*Collier v. Hicks*, 2 B. & Ad. 669). There is an amusing account in Lord Campbell's *Life* (ch. x.) how, in 1812, he and two other barristers ousted the attorneys from "audience" at Monmouth Quarter Sessions, held at Usk.

## 61. Grand Juries<sup>1</sup>

The history of juries in this country is extremely interesting. In remote times they were, perhaps, the actual witnesses automatically<sup>2</sup> constituted into a body; later they gave "voice to the common repute"<sup>3</sup> of the neighbourhood. They were always local folk, and now they are regulated by a rigid system. But what has never ceased is the existence of a local body of notables, to whom<sup>4</sup> anybody could denounce anybody else for serious crime, and who would then take the necessary steps. Any one can still do so, and to-day this body is called the grand jury,<sup>5</sup> and private persons do still go to them. But the number of these prosecutors is not worth speaking of in comparison with the number of charges sent by the magistrates, when they

<sup>1</sup> Suspended during the war; revived Jan., 1922.

<sup>2</sup> Hence their power of *initiating* process, see Stephen 1 *Hist. Cr. L.*, p. 260. The original rough-and-readiness of jury trial survives in the inconspicuous Court of the Savoy in London—an "instance actually existing amongst us," said Sir James Fitz-James Stephen in 1883 (*History of the Criminal Law*, vol. i., p. 271). Originally, "It is an institution fit for a small precinct, where every one knows every one, and can watch and form an opinion upon what goes on." (See p. 64.)

<sup>3</sup> 2 Pollock & Maitland, p. 639.

<sup>4</sup> A judge said in 1872, "They were a secret tribunal, and might lay by the heels in jail the most powerful man in the country, and for that purpose might even read a paragraph from a newspaper" (Byles J., 12 Cox C. C. 353). "The[ir] sole function . . . is to repeat badly what has already been done well: to hear in secret, imperfectly and in the absence of the accused one side of the case after both sides of it have already been heard fully in open court and with full opportunity of legal *aid*. A bad tribunal is laboriously brought together in order to revise the work of a better one." Kenny, ch. xxxi., who adds that a Royal Commission (1913) reported in favour of abolition and "their suspension during the war produced no injustice," but those acquitted under that *régime* would not admit this (nor would some of the convicted). For further discussion see Dr. Kenny *ibid*.

<sup>5</sup> In contradistinction to the "petty," commonly, from familiarity, called the jury.

commit for trial, to the grand jury, the whole of whose work is practically the consideration of those charges. For, the offence being indictable, it is *their* duty to say whether or not they will indict. In order to do this duty, they hear in private, no judge being present, the evidence on oath given before the magistrate *against* the accused, until they are satisfied that there is a case for him to answer, whereupon they publicly present the indictment in court, where it is at once announced that they have found a "true bill"; or, having heard the whole evidence *against* him, they may throw out<sup>1</sup> the bill, which is equally announced at once in public, so that the accused may be discharged,<sup>2</sup> whereas in the former alternative, he must be put upon his trial.

It is obvious that an accused, thus liberated from a trial by the action of the grand jury is saved time, trouble, and perhaps anxiety and expense.<sup>3</sup> But, as nowadays this is the most this body can effect, the question is sometimes raised whether it should not be abolished. Now, it seems clear that (speaking quite generally) when a grand jury

<sup>1</sup> The old Latin formula for this, "*ignoramus*" (we don't know), has given a forcible expression to the language.

<sup>2</sup> But this is not an acquittal (see p. 264); and though it is very rarely done, another bill on the same allegations may be brought before the grand jury. This was actually done where a bill had been thrown out at quarter sessions; the magistrates, presumably for good reason, ordered an indictment to be again preferred at Hereford Assizes, where the bill was found, and the accused was ultimately convicted of assault and sentenced (*The King v. Price*, the *Times*, March 1, 1901).

<sup>3</sup> Judges sometimes take the opportunity of addressing the grand jury, to make public allocutions on important matters of law, as, for instance, the Lord Chief Justice's "charge" in 1867 (which lasted six hours), and Mr. Justice Blackburn's in 1868, both in effect on Governor Eyre's case, but both these addresses on martial law would have been equally in place to any jury. And for such speeches, generally, another occasion could easily be found.

releases, which they only do in from 2 to 3 per cent. of the cases,<sup>1</sup> no petty jury would convict<sup>2</sup>; the accused, therefore, would only be worse off, if this institution ceased to exist, by the suspense, inconvenience, or even pain and exposure of a public trial (though, of course, there must have been some preliminary public hearing). Opinions will differ whether it is worth while for the sake of so few persons,<sup>3</sup> who undoubtedly may gain a good deal through it, to keep up all over the country so troublesome and costly a system. Perhaps when that system is very briefly described, a distinction may appear.

The grand jury generally consists of twenty-three persons (the maximum),<sup>4</sup> and as twelve at least must find a bill, it can never consist of less than twelve; it is not, of course, a fixed body, but it is differently composed each time it meets. There is no longer any property qualification for its members at assizes, but in the language of Blackstone (IV., 302), "they are usually gentlemen of the best figure in the county." Noblemen frequently serve, and Sir J. F. Stephen says (I *History*, ch. viii.), "In practice" they are

<sup>1</sup> According to Dr. Kenny, ch. xxxi (1920); it is said that at some places it is a tradition for the grand jury to ignore at least one bill, to keep alive their right, so to say.

<sup>2</sup> An authenticated story, however, has come down from a certain Quarter Sessions that a man against whom a bill had been *ignored*, was by mistake put on his trial, convicted, and sentenced. The mistake was discovered after the court rose and the prisoner—escaped!

<sup>3</sup> Of whom even some, perhaps, *ought* to be tried, for Lord Chancellor Chelmsford came to the conclusion, in 1859, "that even at the Central Criminal Court"—where there cannot be even the faintest tinge of partiality—"more than half the bills ignored ought to be tried." Kenny, *ibid.* L. Chelmsford had heard the grand jury there called "the hope of the London thief" (Hansard, March 15, 1859, 1612).

<sup>4</sup> There were only 16 at Lancaster in 1910 owing to a snowstorm (*Times*, Jan. 29).

"county magistrates," all, in fact, competent to be special jurors. In London grand jurors are (broadly) the "larger" tradesmen with a sprinkling of other classes, all generally qualified to be "specials," with a somewhat lower scale at quarter sessions. But at quarter sessions of counties grand jurors, who are generally middling farmers or tradesmen, must be qualified like the petty jurors, while in the boroughs, where there is no qualification at all, they are generally tradesmen of good or middling position or men of business. Thus, each grand jury is relatively to its petty jury, of a better worldly standing. (The latter,<sup>1</sup> it may be added, *everywhere* consists, like a common (civil) jury, of men or women who are householders and *generally* not (though they may be) qualified to be "specials." See p. 73.)

The meeting, then, of an assize grand jury is necessarily more or less of a social gathering, for the members are all more or less known to one another in other capacities, and are persons of leisure, and county business is inevitably discussed and promoted. But there is nothing like this common bond in other grand juries where the members are frequently unknown to one another, and being, as a rule private citizens, have less opportunity of forwarding public affairs, and more need to attend to their own. Thus,

<sup>1</sup> Whose members must be over 21 and own a freehold of £10 a year, or be a leaseholder for a term of at least twenty-one years of lands of the value of £20 a year, or occupy a house rated at not less than £20 (or in Middlesex £30). Kenny, *ibid.* (1920).

"What class give you the best jurymen?" a judge (Erle) was asked in 1861. "The respectable farmers and the higher shopkeepers in the country towns," was the answer. "The men from the great cities, accustomed to excess in trade speculations, are inferior to them, especially in an honest sense of duty. The worst juries that I have known come from such places. Their adventurous gambling trade seems to make them reckless" (*Senior's Conversations*, p. 317).

perhaps, it might be suggested that (apart from ignoring a few bills) a grand jury at an assize still serves a practical purpose, while elsewhere it serves none.

## 62. Indictments

The form of indictment, almost the only surviving criminal "pleading," shares the indifference which has overtaken pleadings, generally. A striking instance of the old pedantry has been given (p. 48). "It is scarcely a parody to say that from the earliest times to our own days, the law relating to indictments was much as if some small proportion of the prisoners convicted had been allowed to toss up for their liberty" (Stephen, 1 *History*, ch. ix.). The need of any commentary<sup>1</sup> (however amusing) on this passage is dispensed by the Indictments Act of 1915, which has almost swept away technicality and made it easy for the accused to understand and to plead at once to all or any of the possible charges against him arising out of the same circumstances and for the jury to select the appropriate conviction (if any) while it protects him against *unconnected* charges being heaped up against him in one trial. Thus the points of law that used to be frequently taken on this topic are now rare. Hence the science of indictments is dead and the—once copious—learning<sup>2</sup> on this subject is dying out.

<sup>1</sup> As an instance of the old state of things, in 1897, where a man was indicted with another (who was sentenced to penal servitude for life) for a shocking crime, but was only convicted of being an accessory after the fact (and sentenced to two years' hard labour), it was held that the conviction on such an indictment could not be sustained, and he was liberated (*Richards v. The Queen*, 61 J. P. 389). Of course, he might have been expressly indicted for his crime. See other instances (p. 309 n.<sup>3</sup>).

<sup>2</sup> The curious may consult the Introduction and Appendix to "The Indictments Act, 1915" (Stevens and Haynes, 1916), or the first edition of this book.



## 63. The Petty Jury

Little remains to be added. Of the right of either party (p. 78 n.<sup>2</sup>) to object to any given jurymen serving (for good reason or none), "This," said a judge<sup>1</sup> in 1883, "speaking practically, is a matter of hardly any importance in quiet times in England. In the course of my experience, I do not remember more than two occasions on which there were any considerable number of challenges." There was a case<sup>2</sup> at Tewkesbury in 1865 where the accused (of embezzlement) challenged so many that a jury could not be got together at quarter sessions, and it had to go to assizes: apparently it strongly excited local feeling, which is generally in inverse proportion to the size of the place. Attempts<sup>3</sup> to corrupt jurors or juries are nowadays even rarer than objections to them.

Unanimity is absolutely required<sup>4</sup>: there cannot be a bargain between the parties to accept the verdict of a majority (cf. p. 105). But, as in a civil case, a disagreement leaves the case exactly where it was before it began;

<sup>1</sup> Sir F. J. Stephen, 1 *History*, ch. ix.

<sup>2</sup> *The Queen v. Reynolds*, 12 L. T. N. S. 580. That the power ought to be used sometimes may be seen from the following instances. Mr. Montagu Williams, a famous advocate and magistrate, tells how (about 1870?) a man suborned by the accused or his friends, got on to a jury at the Old Bailey by a trick, and by mere persistence held out till a verdict of "not guilty" was returned, though all his colleagues were justly for convicting (*Leaves of a Life*, vol. i., ch. xvii.). At Lewes Assizes in July, 1904, during a trial for an offence against a woman, it was discovered that the latter's husband was on the jury. In France, according to Dr. Kenny, ch. xxxi., it has given rise to an epigram by Maître Lachaud, "that most eloquent defender of prisoners, 'I challenge every man who looks intelligent.'"

<sup>3</sup> See p. 72.

<sup>4</sup> "Always requiring unanimity is nonsense," *per* L. Cockburn, a Scots judge: *Memorials*, ch. v., p. 301 (1856). See above p. 109.

it is not an acquittal—the accused may be, and often is, tried again. Thus, in 1842, one Gray was indicted at Monaghan Assizes for shooting with intent to murder; one of the jurors was taken ill, and the jury was therefore discharged without a verdict. He was tried again in 1842 and 1843; both times the jury disagreed. The Crown then got the case taken into the Queen's Bench at Dublin, and the case was again sent to Monaghan. This time he was found guilty, and sentenced to transportation for life; but as he had challenged two of the jury without giving any reason, but the court had disallowed his objection, he appealed unsuccessfully to the Irish Queen's Bench, but successfully to the House of Lords,<sup>1</sup> which ordered a fifth trial. In 1873 a man was tried three times for murder, and finally convicted and executed; and in 1902 a man was three times indicted (for rape) at the Central Criminal Court, and finally acquitted.<sup>2</sup> In the Tallow Case, of conspiracy and "exclusive dealing" in Ireland, there were two criminal and two civil trials, in all of which the jury disagreed; in the fifth,<sup>3</sup> a civil action, heavy damages were awarded. But, generally, in practice it is considered unseemly to put an accused person on his trial for very grave charges (and not worth while for light ones) more than once or twice, as the disagreement of juries, presumably, implies considerable doubt, and hence, after two abortive trials of a man for the Peasenhall murder in<sup>4</sup> 1902 and 1903, the Attorney-General exercised his power of stopping further proceedings, in effect ordering the release of the prisoner.

<sup>1</sup> *Gray v. The Queen*, 11 Cl. & F. 437.

<sup>2</sup> *Pall Mall Gazette*, January 29, 1903.

<sup>3</sup> *The Times*, November 13, 1902; *O'Keefe v. Walsh*, 1903, 2 Ir Rep. 681.

<sup>4</sup> *Pall Mall Gazette*, January 29, 1903.

The old story that a judge might take an assize jury, who could not agree, round the circuit with him "in a cart," as a mark of indignity, till he came to the border of the county (where, of course, their jurisdiction ended), when they were shot into a ditch, is a myth,<sup>1</sup> but till recently, the law did take rather strong measures to procure unanimity and independence.

The old rule was, that while they were considering their verdict in any case, civil<sup>2</sup> or criminal,<sup>3</sup> they must not separate nor have food, drink, or fire till they were discharged, as readers of Macaulay's account of the trial of the Seven Bishops, a criminal information in the King's Bench for seditious libel, may remember. But in mis-

<sup>1</sup> *The Queen v. Charlesworth*, 1 B. & S. 449 note, in 1861. Lord Lyndhurst (Ex-Chancellor) is quoted as saying that there never was any such jury-carrying in this country—apparently, not even that permitted (?), viz. in a decent carriage—but in an Irish case in 1845 it was positively asserted that it had been done twice within living memory, once within the ten years (*Conway etc. v. The Queen*, 7 Irish L. R. 156). It will not have escaped notice that many of the extreme cases of jury practice happen in Ireland, perhaps because political feeling still moves all classes there.

<sup>2</sup> "Lord Lyndhurst . . . told a curious anecdote. . . . There was a (civil) cause in which the jury would not agree on their verdict. They retired on the evening of one day, and remained till one o'clock the next afternoon, when they were discharged. There was only one juror who held out against the rest—Mr. Berkeley (member for Bristol). The case was tried over again and the jury were unanimously of Mr. Berkeley's opinion, which was in fact right" (Greville's *Memoirs*, January 19, 1831).

<sup>3</sup> In 1821, after the jury had retired in a case of stealing at quarter sessions, one of them separated from the rest and conversed respecting his verdict with a stranger. The jury found "guilty," but the justices set the verdict aside as bad, and indicted again at the next sessions, when there was also a verdict of guilty. It was held that they were right in this course (*The King v. Fowler*, 4 B. & Ald. 273). So strict is the rule that when a judge sent the Clerk of Assize to ask if there was any chance of the jury agreeing and he answered a question they put him and gave them advice, the conviction they found was quashed (*R. v. Willmont*, 10 Crim. Ap. R. 173, 1914).

demeanours and civil cases, though not in felonies,<sup>1</sup> they were allowed (almost without exception) to separate during any adjournment of the hearing (including that overnight), though not during their final deliberations, the rigours of which, however, in *all* cases have been abated.<sup>2</sup> And now, since 1897, the court may, and commonly does, permit the jury to separate before they retire to consider their verdict in *any* case except treason, murder, or treason-felony.

The inconvenience of the old system was so great that in long cases charges of misdemeanour could only be preferred, though felony was alleged, for fear of the expense and trouble of keeping the jury isolated for a long time, (or even one of them becoming ill or dying), as, for instance, in the case<sup>3</sup> of "The Claimant," whose trial for perjury lasted 188 days in 1873-4, and who otherwise would have been indicted for forgery (of "Tichborne" bonds).

## 64. Plea of Guilty

A plea of guilty, of course, relieves the jury (since 1920 both juries) from hearing the case. But in very grave charges the judge advises the accused not to plead guilty, at any rate, without the advice of counsel; but sometimes

<sup>1</sup> So that, when it was found that during a murder trial at Northampton in 1892, a juror had separated from his colleagues during the interval for lunch, the judge discharged the jury and postponed the trial to the next assizes. The usual course, in case of any accident or fatality, is to discharge the jury and at once to swear the eleven remaining again and a new jurymen, and to begin again. To meet such emergencies, it has been proposed always to swear a reserve (thirteenth) juror in felonies, who would normally be a "deadhead" (*Law Times*, November 26, 1892, p. 76).

<sup>2</sup> There is a dramatic account of an Old Bailey jury in a murder case locked up for ten days and nights in Dickens's "Trial for Murder," the first of "Two Ghost Stories." 1865.

<sup>3</sup> Even as it was. the jury cost £3780 (Irving's *Annals*, July 14, 1877).

even on a capital charge the accused insists on so pleading. On the other hand occasionally an accused pleads guilty without meaning to confess a *technical* crime, or even falsely (see p. 194); this can be set right on appeal. Whether to advise a client to plead guilty is often one of the most anxious considerations of counsel.<sup>1</sup>

## 65. Evidence

The general rules already laid down (pp. 186 and foll., 210) apply with full strictness where life or liberty is at stake. Some check on the witnesses is afforded by the fact that what they said before the magistrates (or coroner)—where they

<sup>1</sup> The ethics of advocacy cannot be treated here, but the fascinating subject, under that title, was thoroughly handled by Dr. Showell Rogers in the *Law Quarterly Review*, July, 1899. Incidentally he disposes of the nonsense about its being wrong for counsel to defend persons whom they "know" to be guilty; they never do know; the accused very rarely confess to counsel. The leading case is that of Charles Phillips, who defended Courvoisier for murder in 1840, for which he was executed. During the trial he admitted to Phillips that he was guilty; "then," said counsel, "of course you will plead guilty." "No, sir, I expect you to defend me to the uttermost." Thereupon Phillips consulted one of the judges on the bench (a sort of assessor: though he was not the one trying the case (who knew nothing of the confession), still it was perhaps not fair to him, who "unhesitatingly advised Phillips that he was" bound to go on with the defence "*and to use all fair arguments arising on the evidence.*" Note: "Whether Phillips exceeded these limits has been the subject of keen controversy." Trollope was probably thinking of this case when he makes the young counsel say to the old judge (in *Orley Farm*, vol. ii., ch. viii., 1862), "Would you [take the case] in my place?" "Yes, if I were fully convinced of the innocence of my client at the beginning." "But what if I were driven to change my opinion as the thing progressed?" "You must go on in such a case as a matter of course. . . ." Phillips's colleague was in the same dilemma; if both had withdrawn the defendant must be convicted. It is true that in his speech he never expressed his belief in his client's innocence, but his references to God read oddly, considering what he knew (1 Townsend's *Modern State Trials* 252). Such rhetorical passages are now out of date and such expressions of belief condemned (though there are famous precedents). See Rogers's pamphlet, and cf. p. 196 n. above.

have nearly always been called for the Crown (p. 274)—is carefully transmitted (signed by themselves) to the trying court, and one side or the other is sure to seize on any discrepancy between their testimony then and now. A great advantage of this transmission is that in the event of a witness dying before the trial, or being too ill to attend it, the official report of what he or she said may be used before both juries. Hence it is always advisable to cross-examine a witness at the earliest opportunity, if at all, for if he or she does not appear at the trial, this advantage (when it is one) is lost; no evidence can be *read* unless the accused had an opportunity of cross-examining it when delivered. For the same reason (to say nothing of others, p. 210 n.<sup>2</sup>), each side does well to call all its witnesses at the preliminary hearing. But written evidence is by no means lightly received instead of the living witness (p. 82).

Since an Act of 1898 swept away the last relic of the old<sup>1</sup> theory of evidence, practically everybody, notably the accused, may be a witness, and (almost, p. 81) everybody but the accused may be compelled to be a witness—with a proper saving that a husband or wife shall not be called *against* each other (except where the charge is a *family* crime, i.e. against spouse or children, when he or she must almost necessarily be called), and, if called, shall not be compelled to disclose any communication made by the other since marriage. Moreover, no one but the judge may comment on the accused not going into the box and testifying

<sup>1</sup> The impediments to justice seem to culminate in a trial for uttering forged cheques in 1823. The partners whose name was forged could not be called to prove this because they were interested (as, if the paper was genuine, they must pay the defrauded bank), so one partner was "released" by the bankers, and proved the forgery. But this was not enough. The bankers' clerk who was to prove the uttering was a Quaker, and could not be sworn, so the prisoner was acquitted (*Rex v. Pigeon*, 1 C. & P. 98). (See p. 83 n.)

on oath, like any one else. It must be obvious that there are some cases in which his not doing so is a plain indication of guilt, and a judge is bound to point this out to the jury.<sup>1</sup>

One sort of evidence, viz. that about character, calls for a separate word. Obviously, if the facts are plain no amount of good or bad character can save a guilty man or condemn an innocent one on a specific charge; an act or omission is then in issue, and not previous character (except, indeed, when the very question for the jury is about character, as in some libel trials). Consequently, an accused is not expected to produce evidence of his general good character, but he may do so if he likes, and obviously where *the facts* are doubtful, such evidence may be of great weight. For instance, in *Our Village* (1819), Miss Mitford says of the trial of "the Incendiary": "One poor man alone had retained no counsel, offered no defence, called no witness, though the evidence against him was by no means so strong as that against his fellow-prisoners, and it was clear that his was exactly the case in which testimony to character would be of much avail. . . ." A day labourer "drest in a smock frock . . . clean and respectable in appearance, but evidently poor," appears unsummoned for the prisoner. "I heard that he was to be tried to-day," he said, "and have walked 20 miles to speak the truth of him as one poor man may do of another." He had known prisoner "as long as I have known anything. We were playmates together, went to the same school, have lived in the same parish; I have known him all my life." "And

<sup>1</sup> As in *The Queen v. Rhodes*, 1899, 1 Q. B. 77, and in a case (*The Times*, February 24, 1904) where the accused was charged with (and convicted of) bribing voters; if there was any innocent explanation of the money passing, he must assuredly have come forward to give it.

what character has he borne?" "As good a character, my lord, as a man need work under . . ." "principally from this direct and simple tribute to his character the prisoner in question was acquitted."

It is only fair that if the accused tries to get the benefit of a good character when in fact he has a bad record that this should be exposed to the jury, and the law is the same if he makes "imputations" on the other side (though this is not so easy to avoid). In both cases he has little to fear unless he has had

## 66. Previous Convictions

the evidence of which is strictly regulated. They are scrupulously<sup>1</sup> withheld from the jury before verdict—unless the law exceptionally permits—for the obvious reason that if their minds were balancing on the particular charge,<sup>2</sup> it might turn the scale against the accused. The chief exceptions are: (1) On charges of knowingly receiving stolen property, when any conviction within the previous five years for "any offence involving fraud or dishonesty" may be proved against the accused, a natural stringency in view of the peculiar insidiousness of this crime; (2) when an accused expressly sets up his own good character<sup>3</sup> as

<sup>1</sup> There is a story that an eminent advocate prosecuting two old gaol-birds jointly charged, who denied all knowledge of one another, called a witness from whom he elicited that he was a warder in a convict prison, that he had known the prisoners and seen them daily together for years. If this is true, it was an abuse of a just rule.

<sup>2</sup> "I remember," said an Irish judge in 1866, "a case . . . where the jury were a long time finding a verdict upon a "subsequent felony," and when on convicting they heard of the previous one, the foreman said if they had heard of that before it would have saved a world of trouble" (*The Queen v. Fox*, 15 W. R. 108: p. 310 n. See p. 305).

<sup>3</sup> It has been held that an accused testifying that he lives at a certain place and works at a certain place is thus claiming a good character, on the ground that it is thereby suggested that he is



an argument of his innocence—in which case it is only fair that the jury should know his record—or, by way of clearing himself, make imputations<sup>1</sup> on the character either of the prosecutor or of any of his witnesses, or himself gives evidence against any one charged with him, i.e. puts the blame on another. The previous conviction must not be too remote or irrelevant; if it is “raked up” spitefully it would excite sympathy with, not feeling against, the accused.

## 67. Defence

On all grave charges, and many where the judge thinks that there may be a good legal defence, he will see that the accused is defended by counsel. For a long time (and it occasionally happens still) the judge would request some barrister present to defend a person in the dock when the case was called on (and sometimes has paid him a fee out of his own pocket), and the bar made it a point of honour to comply. In 1904 the system began to be formulated of giving legal aid to a “poor prisoner” on his *trial by a jury*, viz. either the services of counsel alone or those of a solicitor as well, at the public expense (the money allowance, however, being small), provided that the committing magistrate or the trial judge thinks that in view of *the defence set up* “it

leading a respectable life. But surely this is too harsh a construction, for such a suggestion may be perfectly true without being a claim to good character.

<sup>1</sup> But this must not be unduly pressed. Thus when of two defendants jointly charged, one said in evidence that the prosecutor’s statement was a lie, “and he is a liar,” whereupon the chairman allowed evidence of his previous convictions to be given, and they were both found guilty, the conviction of both was quashed (though the chairman thought the previous convictions had not affected the verdict), because the words in question were merely an emphatic denial of guilt (*The King v. Rouse & Burrell*, 89 L. T. 677, in 1904).

is desirable in the interests of justice." But defendants before magistrates very often "reserve their defence" (wisely sometimes, especially in cases of complication, for they have not the information which they may get in the interval before trial, and may not wish till then to show their hand to the other side). Where the answer is a total denial, e.g. "I was not there" (*alibi*), or "the whole charge is a concoction" (though this is rare), no honest person would hesitate to say so at the earliest possible moment. But when a defence is reserved the court above is sometimes in a difficulty about granting legal aid just because no defence has been disclosed. Indeed, advice is often most needed whether the defence should be reserved or not. (See also p. 268). It is significant of the temper<sup>1</sup> of a British criminal court that counsel never exercises the right of "summing up" against an undefended person.

A "dock" defence also illustrates the tradition of the bar that it is not free to refuse its services. An accused actually in the dock can claim to be defended then and there by any counsel present on handing him one guinea, and this is frequently done, busy men being sometimes "captured"; there is a case of a counsel who was kept sixteen days (September, 1921) in such a case. The custom arose as the criminal classes learned that theoretically counsel's services were honorary, and that the lowest legal fee recognised is a guinea.

The drawback of these abnormal forms of advocacy is that there is no time to "get up" the case and make enquiries if necessary—as there would be in the case of a richer client. It is clear, however, that this sort of experiment is a half-way house to a complete system of defence

<sup>1</sup> It has even been said that the judge and counsel on both sides are in a conspiracy to get the defendant off.

of poor persons, such as has existed in Scotland for centuries. For "Verdict"\* see pp. 105-7, and 285.

## 68. Sentence

Any (legal) sentence may be pronounced at assizes. At quarter sessions, penal servitude for life may be inflicted (for burglary, and for a second or subsequent conviction for felony), but such a case seems to be unknown, fourteen years being generally the limit of that tribunal's severity, that term, too, being very rare there. The minimum period of penal servitude is *always* three years. In short sentences detention before trial is taken into account, and for some offences that detention is even considered sufficient punishment; indeed, some cases are met by mere detention till the next court so as to avoid a sentence of imprisonment.<sup>1</sup>

The science of penology is no longer in its infancy, and we have begun to learn its lessons. Plato finely suggested that the physician ought to know what pain is. Judges are naturally ignorant, except in the most general way, of prison life, and no one would propose that they should undergo a term of imprisonment, but the "savage" sentences of the past were undoubtedly due to that ignorance. The school that holds crime to be a form of disease has won at any rate, to the extent that each case is to be considered on its merits, so to say, and that the professional

<sup>1</sup> Even in 1781 credit was given to detention, for a man being sentenced to death in September for forgery, and the doubt on a legal point not being settled (against him) till January, he was pardoned "in consideration of the long confinement he had suffered," and only sentenced "to raise gravel for three years on the Thames": 1 *Leach* 227.

\* "Not proven" is not an English formula (except that by 24-5 Vict. c. 100 Justices may find it in assault) and equals "not guilty." Sir Walter Scott called it "that bastard verdict . . . I hate that Caledonian *medium quid*" (Diary, Feb. 20, 1827).

criminal is recognised as the chronic sufferer (and one to be isolated). Dr. Kenny<sup>1</sup> quotes the epigram of an experienced prison governor—"one half of the people in our prisons ought never to have been sent there, and the other half ought never to come out." But a capable writer,<sup>2</sup> who professed to be an ex-convict, disbelieved the second half of this proposition, and advocated a reform of the internal tone of prisons.

At any rate, the "habitual criminal" was created by an Act of 1908.<sup>3</sup> That statute is an attempt to solve the problem: What are we to do with people who are not in fact deterred by their previous punishments? It is very easy to say—send them to prison for life, but this is not merciful, and abandons all effort to restore them to normal society. The new experiment consists of treating habitual criminals as patients and first applying to them the old cure—determinate sentence of penal servitude for the new offence, and then, after its expiration, indeterminate sentence for not less than five nor more than ten years—known as "preventive detention"—which may come to an end when the prisoner's reformation is guaranteed—as far as it can be, i.e. with reasonable probability—by the expert authorities who control him. It is needless to say that the "habitual" is encouraged as much as possible to start afresh morally. As there were only 23 so sentenced in 1919-20 and 44 in 1920-1 (including 2 females), and only 75 males and 1 female in preventive detention

<sup>1</sup> Outlines, C. 32 (1920), where (and in C. 31 *ibid.* from "Judgment" and C. 33) is by far the best account in English of the present state of thought on this subject. Would not "a third" be truer above, the other third getting just the right treatment for their malady?

<sup>2</sup> In the *Nineteenth Century*, February, 1904.

<sup>3</sup> The name first appears in an Act of 1869: 32-3 Vict. c. 99.

on March 31st of 1921, it would seem that the experiment is successful.

Penal servitude seems to have been introduced in 1853 in substitution for transportation out of the realm. The essence of this "treatment" is that it is applied for a *sufficiently long* time to "patients" collected into settlements as in a special hospital, where they are subject to the prescribed diet (in its original sense, a course of living), the chief ingredient of which is *regular* healthy work, whereby it is hoped, the industrious habits of the trade taught may be formed. In 1920-21 462 men and 20 women were sent to penal servitude.

Hard labour, which is usually imposed with imprisonment, is a different kind of "cure" required in view of the less heinousness of the offence, and especially of the comparatively better antecedents of the offender, the doctors, so to say, not having him under their care for anything like so long a time as the convict of the class mentioned above. The culture, as it were, is more "intensive"; the actual physical toil normally inflicted on a healthy criminal is generally supposed to be more severe than it is in the incidents of penal servitude. Hence, two years' hard labour is assumed to be the limit of endurance of the human frame, and even that term is ordered very sparingly.<sup>1</sup>

There are other modes of imprisonment gradually less severe down to mere incarceration (as of "civil" prisoners<sup>2</sup>). Among these the Borstal system (taking its name from a

<sup>1</sup> Three years' hard labour is legally possible (for an assault in resisting arrest by an authorised person) under a section (12 of 14-5 Vict. c. 19) which is still technically unrepealed. So the pillory still figures as a punishment (for a common informer compounding with an offender) by S. 5 (4) of 18 Eliz. c. 5, though it was abolished in 1837.

<sup>2</sup> Mere detention pending trial or that of debtors and of some minor criminals, so to say, is not attended with penalties.

place near Rochester, Kent, where it was first practised), for youths between 16 and 21, has been most successful. Borstal is a sort of public school among prisons, where games are encouraged as among youths of that age outside, with, no doubt, the same good effect on character.

The details of all these courses<sup>1</sup> are still being carefully worked out, and have long included a determined policy of reforming and even of refining the convict and of speeding him well on his new and better way after release, which is often accelerated by way of encouragement—all this with the best and ever better results.

## 69. Particular Work of Quarter Sessions

So far we have dealt with this court and assizes jointly, in respect of crimes tried by jury. We now touch on *other* powers of the justices *without* juries—though the Bench itself may, and often does, consist of more members than a jury. In such cases, in boroughs the recorder sits alone as sole judge. But in certain highway cases, owing to the great public interest at stake, juries are interposed. In London, too, under a special Act, there are occasionally juries in such non-criminal cases.

The only criminal business without juries<sup>2</sup> is appeals from magistrates. The justices (or the recorder) hear the whole of the case, as if it had never been heard before, and may reverse or modify or confirm the sentence of the inferior

<sup>1</sup> See the admirable "English Prison System" 1921, by Sir E. Ruggles-Brise, Chairman of the Prison Commission.

<sup>2</sup> Except the punishment of "incurable rogues" and of youthful offenders fit for Borstal, convicted by magistrates and sent to Q. S., the sole instances of one court condemning and another punishing. Both classes may appeal to the Court of Criminal Appeal.

court, but they cannot increase it. A majority decides; the chairman has no casting vote.<sup>1</sup> If the Bench is equally divided, nothing is done, i.e. the appeal fails. There is no further appeal (except on a point of law).

But a large number of civil appeals (from magistrates, guardians, committees, etc.) have been placed within their jurisdiction by Parliament; of these, the most important are in cases of bastardy, rating (county, poor, etc.), settlement of lunatic and other paupers, drink licences, diversion or stopping of highways and inclosures.<sup>2</sup> This legal business is peculiarly *county* work. Their remaining functions, peculiarly county but not legal work, have been "almost entirely transferred to the County Council," but they still retain certain administrative powers over highways, licensing, lunatics, police and prisons.<sup>3</sup>

## 70. Appeal

An era was marked in English criminal law when a Court of Criminal Appeal was established by ch. 23 of 7 Edward VII. in 1907,<sup>4</sup> and began to sit in 1908. Till then

<sup>1</sup> The Queen against the Inhabitants of Fladbury, 10 Ad. & E. 706, in 1841.

<sup>2</sup> *Encyclopædia of Laws*, "Quarter Sessions."

<sup>3</sup> The Court may be compelled to do certain things or may take the opinion of a superior court in certain matters exactly like a court of summary jurisdiction (p. 275), and in this way appeals from the latter to the former may be again reviewed.

<sup>4</sup> Undoubtedly public opinion had been stirred by the discovery in 1904 that a Mr. Beck, who had been sentenced to seven years' penal servitude in 1896 for frauds and convicted again for the same offences (but not sentenced) in 1904 without any right of appeal, had been the victim of a "double"—prosecutions in respect of which he received £5000 as compensation—but there was already a long history of the attempts to secure such a right by law, for the details of which see (Introduction to) The Criminal Appeal Act (Jordan & Sons, 1908) by Sir H. Poland, K.C.

criminal appeal was confused and unscientific. There is not, and there never has been, an appeal from an acquittal by a jury.<sup>1</sup> Even where an accused (of assault) obtained an acquittal by a trick—he got his case at quarter sessions taken at a time when he knew the prosecutor was not there, though he was bound to give him ten days' notice, and had not done so—a superior court refused to interfere.<sup>2</sup> Nor was there till 1908 an appeal *on the facts* from conviction<sup>3</sup> by a jury (p. 67). But in 1848 a great step forward was taken by the creation of the Court for Crown Cases Reserved—a great historic link between the present Court of Criminal Appeal and the only similar institution for centuries before, viz. an informal assembly of the judges of the King's Bench. This was a mere voluntary gathering which met when one of their number was in doubt about a *point of law* at a trial where he had presided, and there had been a conviction. If they or a majority thought that a

<sup>1</sup> There were a few cases of acquittal where a new trial was granted, but these were cases of non-repair or obstruction of highways, originally owing to their enormous public importance, criminal *in form* only and now seldom even in form, and such new trials have been abolished. And even previously if there was danger of imprisonment, an acquitted person could not be tried again as in one such case (*R. v. Duncan*, 7 Q. B. D. 198, 1881) a judge pointed out adding that the one solitary historic case (*Scatfe*, p. 210 n.<sup>2</sup>) in which there had been a new trial and a conviction after an acquittal for felony had been overruled as a "revolution in criminal law."

<sup>2</sup> *R. v. Unwin* 7 Dowl. 578, 1839.

<sup>3</sup> Occasionally misdemeanours tried in the King's Bench got the advantage of the procedure of that court, which, being normally civil, allowed appeals, e.g. *Whitehouse's* case in 1852 (1 D. & P. 1). A new trial and acquittal followed a trial and conviction which was obtained because the Crown did not produce a material witness; this was hardly an appeal *on the facts*; so of the quite exceptional case of *Scatfe*. In 1825 it was discovered at the Cornwall Assizes that a man had by mistake sat on a jury *for his father*, and convicted a prisoner for perjury; the latter obtained a new trial: *R. v. Tremarne*, 5 B. & C. 254.



mistake in law had been made (if only in procedure) they had no power to rectify it, but they could and often did recommend the Crown to pardon (pp. 235, 310) the convicted person absolutely or to commute his sentence and, as there was no other form of redress, their view was always adopted. But only the judge at the trial could resort to this expedient. In 1848 the innovation was made of giving the Jury Court the right, on the invitation of the "guilty" person, of formally stating the *legal* point for (at least) five judges to decide—and so to quash or confirm the conviction. But still there was no tribunal for the accused to go and say: "The jury have made a mistake in fact: I am not guilty." And the judge could not be compelled to "state a case"; if he had no doubt about the law as he laid it down nothing could be done. Thus a "Crown Case Reserved" frequently had to decide whether there was "misdirection," i.e. a mistake in law, especially where the jury, through (correctly) applying the wrong law to the facts, might have been misled. In 1907 this court was merged<sup>1</sup> in the new Court of Criminal Appeal, i.e. all the judges of the King's Bench Division, three being a *quorum* and the usual number sitting.<sup>2</sup>

<sup>1</sup> But not abolished: it still exists in Ireland, where there is not a Court of Criminal Appeal (nor in Scotland). One result of this survival is that the power of declaring a trial a nullity or "mistrial" e.g. *Tremearne's* case above, and ordering a *proper trial*, which the C. for C.C.R. undoubtedly exercised, passed in 1908 to the C.C.A.—as the House of Lords decided in *Crane's* case in 1921 (15 Cr.A.R., 183). (The lay mind or even other minds may not appreciate the difference between this power and that of ordering "a new trial," which was expressly denied to the C.C.A.) Here two men *separately* indicted for the same theft were tried together and convicted, and the C.C.A. had ordered the case to be tried again.

<sup>2</sup> On special points five sit, and, if necessary, the whole 19 "K.B." judges would sit. In the great *Franconia* case (*R. v. Keyn*) L. R. 2 Ex. Div. 63)—see p. 38—fourteen judges sat (1876).

The capital facts about this tribunal are that

- (a) It can quash a conviction if it thinks the verdict "unreasonable," or that it "cannot be supported having regard to the evidence," i.e. it can reverse the jury *on the facts*.
- (b) It can quash or decrease<sup>1</sup> any sentence.
- (c) It can quash a conviction (or sentence) on a point of *law* (just as its predecessor, above p. 300 could) or
- (d) if "on any ground there was a miscarriage of justice."

The last words are a welcome tribute to the ideal of generations of reformers—the identification of law with justice. The long and steady recoil from technicality which we have noted elsewhere can hardly go further than the words in the "charter," so to say, of the Court: "Provided that" it "may, *notwithstanding* that they are of opinion that the point raised in the appeal might be *decided in favour of the appellant*, dismiss the appeal, if they consider that no *substantial* miscarriage of justice has actually occurred." A man is no longer to escape the penalty of his misdeeds because his name has been misspelt in an indictment, but, at the same time, even such a person is to be protected from the prejudice of an unfair cross-examination too well instructed about his past. Thus the court, which constantly acts on this proviso, frequently has to balance the question whether some irregularity at the trial, technical or practical, did or did not weigh the scale unfairly against the convicted person.

The right to appeal on a point of *law* is unlimited; otherwise the consent of a judge must be obtained, but there is

<sup>1</sup> Or even increase—but this it has very seldom done—only in a few cases of utterly unreasonable appeals. Of these, by the way, there have been many fewer than some critics anticipated.

an appeal for this consent from one judge to three judges. An authorised appellant may be allowed counsel and solicitor at no expense to himself. Space can only be found for a few examples. A day or two before and after the war broke out the German Consul at Sunderland, a German by birth, but naturalised in 1905, was active, as his official duty required, in sending Germans from this country to their own to serve in the German army. Now, of course, he was quite entitled to do this up to 11 p.m. on August 4th, 1914, when we declared war against Germany. But he was tried for high treason for what he did on the 5th, and was sentenced to death. Nothing could have been said against the verdict—even if he had not known that this country was at war with Germany—if the jury had found that his intention and purpose was to assist the King's enemies against the King (within the Treason Act of 1351); in that case, the fact that at the same time he was doing the work for which he was paid would not have availed him. But, in fact, the judge omitted to direct the jury that they must consider the accused's intention before they could find him guilty, and, though, had he done so, they might well have found that his purpose was hostile to this country, yet as this vital legal point had been overlooked, five judges quashed the conviction and released the prisoner—a strong instance of the reversal of a verdict in a point of law.<sup>1</sup>

In September, 1911, about 2 a.m., a woman was murdered in Clerkenwell. If the story of F., a disreputable person who possibly helped the criminal beforehand, and certainly assisted him to get away and of two disreputable women was to be believed, E., the accused, confessed to them within half-an-hour of the murder that he had done it. Later on

<sup>1</sup> *R. v. Ahlers*, 11 Crim. Ap. R. 63.

the same day the three made statements—at a police-station—implicating E., and in due course they gave evidence, that of F. being by far the most damning, though it was corroborated in some points by that of the two women. Now the statements of the women had been duly made evidence by the prosecution so that when they were in the box the accused's counsel could and did confront them with any inconsistency between those statements and their oral testimony. But F.'s far more deadly statement had *not* been made legal evidence; the accused's counsel had never seen it. Yet the judge, in summing up, constantly quoted from it, evidently under the impression that it had become evidence, and pointed out how F.'s oral evidence that day tallied with what he had said at the first moment. Naturally he was convicted and sentenced to death, but the Appeal Court felt bound, whatever the true facts were, to set aside the conviction<sup>1</sup> obtained—or even influenced—by so grave a misstatement as that of the judge. They took the opportunity, by no means the first, of regretting that they had not the power of ordering a new trial<sup>2</sup> (such as the civil Appeal Court has); they would certainly have ordered it here.

Another source of irregularity is the jury itself. Misconduct by individual jurors is very rare, but sometimes it is clear that the whole body has made an honest mistake. During the course of a trial<sup>3</sup> for theft, in 1912 a juryman said to the accused's counsel, "Your client has not called any evidence of his good character"—a matter very carefully regulated by law, p. 292. The judge at once intervened and pointed out that there was no obligation on the accused

<sup>1</sup> *R. v. Ellsom*, 7 Crim. Ap. R. 4.

<sup>2</sup> See p. 301 n.<sup>1</sup>.

<sup>3</sup> *R. v. J. Newton*, 7 Crim. Ap. R. 214. There is another instance of irregularity in jury practice, p. 287 n.<sup>3</sup>.

to call any such witness. When the man was found guilty the jury asked the judge to deal with him under "the First Offenders' Act"—but, unfortunately, he had been convicted eighteen times and had often "had" penal servitude. "Ah!" said the juror, "I thought as much; I only asked about the man's character so as to get the jury to agree." The conviction was quashed, for, the direct evidence being slight, the Court was certain that the jury had speculated on the accused's bad character, and this had turned the scale. They were correct in their guess, but they had no right to guess. This instance suggests that when there is no evidence of good character juries often conclude that there is no good character.

Mere difference of opinion from that of the jury on the *facts* of a case, no flaw in procedure being alleged, is naturally a much rarer ground for the courts giving relief, for it is very slow to differ from the body which till 1908 was in law the absolutely final arbiter on disputed facts.<sup>1</sup> But sometimes it is driven to do so—by those facts. In 1914 a lady was bicycling on a lonely country road about 4.30 p.m. on February 17th, when she was attacked by a soldier, probably with a very sinister purpose; she was certainly hurt. The accused was quartered at barracks three miles from the scene; she gave a description of her assailant to

<sup>1</sup> "Countless are the acquittals that have been secured by the influence of those impressive words—still used—Remember that your verdict is final": Kenny, *Outlines*, ch. xxxi. It was feared that the existence of a reviewing authority would weaken the jury's time-honoured sense of responsibility; whether this is so it is impossible to say. Juries naturally hesitate to condemn on grave charges, but there is no longer the same motive for their trying to find a loophole—or less—for acquitting, as when "for years . . . juries went on finding on their oath that goods of the value of £50 were under the value of five shillings" (Campbell's *Life of Eldon*, c. 200, 1810), lest the prisoner should be hanged ("pious perjury")—a good illustration of Aristotle's dictum that the law is powerless against public opinion. (Cf. p. 45).

the police; he had, she said, "a fierce-looking ginger moustache," and she, in fact, picked the accused out of a hundred men. Another witness who saw the culprit's moustache as he was running away after his crime picked the same man out of twelve, and so did another witness. But the accused had not, and never had had, a moustache; during his seven weeks' detention no moustache grew, and there were other discrepancies between the described and the actual man. Nevertheless, the jury found the accused, who set up an *alibi*, guilty not of the graver charges, but of (common) assault. But this the superior court<sup>1</sup> set aside, believing that there must have been some resemblance between the criminal and the man before them, and that the jury, loath to let so dastardly a crime go unpunished, but yet not being quite sure of their man, had compromised on the lesser offence. "The jury must have really doubted," said a judge, "whether the case was made out." The courts naturally abhor a "compromise verdict" in criminal cases. Defendant's counsel thought that the gentlemen in the box were, perhaps, in a hurry, as at four p.m. they had had no food since breakfast—

"Wretches hang that jurymen may dine."

In 1915 H. and G. were convicted of receiving stolen property, knowing that it was stolen.<sup>2</sup> It was stolen on January 25, and on February 1 the police found it in a room let to G. in H.'s house. When H. was taxed with the stuff he said, "I wish I had never seen the man; I bought them *from* (or *for*, which was hotly contested) G.; he rents the room from me." G. explained that he had bought the things very cheap at a popular market and called a witness to corroborate that fact; this, whether true

<sup>1</sup> *R. v. J. Flood*, 10 Crim. Ap. R. 227.

<sup>2</sup> *R. v. Holmes & Gregory*, 11 Crim. Ap. R. 130.

or false, was uncontradicted. Nevertheless they were both convicted—because, perhaps, the gentleman summing up showed clearly that they were *possibly* guilty. They were, however, released by the court. This, perhaps, is not a perfect example of pure reversal of findings of fact, owing to the contribution of the bench mentioned, but it is a good instance of the grand principle which the court laid down in so many words in 1917, viz. if the facts are equally consistent with innocence as guilt, it leans to relief.<sup>1</sup> There a doctor was with others found guilty, after a seven days' trial, of (in substance) corruptly certifying recruits as unfit for military service or only fit for home work. The evidence was complicated, but three judges came to the conclusion that there was no direct evidence against the accused of any of the offences alleged against him (e.g. there was no evidence that he had received one farthing corruptly); the facts proved were quite consistent with his innocence, and they reversed the jury.

Another paramount duty of the court is to reconsider sentences, when it is asked to do so. In a few cases the judge has no discretion what sentence he shall inflict, e.g. in capital crimes, but in all other cases obviously there may be differences of opinion whether he has been too severe or too lenient. The Appeal Court is often confronted with the suggestion that, in the given circumstances, the sentence is too severe. Those circumstances, of course, vary infinitely, and are never the same, though they may be more or less similar. Hence the court has never swerved from its view that it is impossible to "standardise" sentences<sup>2</sup>; it deals with each case on its demerits. But its ruling is always merciful, and "many a burglar" it has

<sup>1</sup> *R. v. Caley*, 12 Crim. Ap. R. 231.

<sup>2</sup> E.g. 15 Crim. Ap. R. 77, 1920.

"restored to his friends and his relations" at a much earlier date than the trial judge proposed. One very valuable result of this commanding attitude has been that inferior tribunals have been very much more sparing in the infliction of punishment, for no tribunal likes being overruled. And generally it has "keyed up" those courts to the proper pitch, especially of (the tune which calls for an artist) the "charge" to the jury. "Acting in harmony with the spirit of the hour they have sensibly lowered the standard of severity; the savage sentence is a thing of the past. Thus they have insisted that the maximum legal penalty should be reserved for the worst cases of the crime, and that detention before trial should be allowed for in the term; they have strongly discouraged the imposition of penal servitude after imprisonment with hard labour or of hard labour after penal servitude and of penal servitude for a first offence, or, if such a penalty is inevitable, they have preferred the minimum term of three years. . . . In short, even their failings have leaned to leniency's side."<sup>1</sup>

The jurisdiction of the court is so comprehensive that it has quashed a conviction following even a plea of guilty when that confession was made under a mistake (of law,<sup>2</sup> or untruthfully,<sup>3</sup> etc.). Another striking instance is that where a conviction is quashed after the sentence has been served<sup>4</sup>—the public recognition of a mistake of justice being

<sup>1</sup> *The Quarterly Review*, October, 1918.

<sup>2</sup> *R. v. Alexander*, 7 Crim. Ap. R. 110; conviction in February, 1910; bound over; brought up for judgment in December, 1911, and sentenced to two years' imprisonment with hard labour; time for appeal extended for the plea in 1910; conviction quashed January, 1912.

<sup>3</sup> *R. v. Verney*, 2 Crim. Ap. R. 107, 1909.

<sup>4</sup> *R. v. G. H. Williams*, 8 Crim. Ap. R. 71, 84; six months' imprisonment with hard labour on October 30, 1911, for housebreaking; fresh evidence implicating another person; appeal successful on



more honourable to the victim than a royal pardon which *may* only imply a remission of penalty. Thus the judgments of the court range from the supremest human interests to technical *minutiae* and "illuminate every nook and cranny of doctrine, practice and procedure,"<sup>1</sup> of our criminal law, of which, in short, it is the oracle. (See p. 118).

There is an appeal from this court to the House of Lords. If either "side" can obtain the certificate of the Attorney-General that "the decision" on appeal "involves a point of law of exceptional public importance, and that it is desirable that a further appeal should be brought" it "may appeal from that decision to the House of Lords": *Crim. App. Act, 1907, s. 1(6)*.<sup>2</sup>

November 18, 1912. Other instances of fresh evidence, e.g. confession by another, leading to release after *part* of sentence served are *R. v. Tanner*, 6 *Crim. Ap. R.* 292; seven years' penal servitude, July 10, 1910; conviction quashed August 18, 1911, *R. v. Hopkins*, 7 *Crim. Ap. R.* 109, 126, 1912; released by the Home Secretary and conviction then quashed; *R. v. Thompson*, 7 *Crim. Ap. R.* 203, 1912; referred to the court by the Home Secretary; in all three cases leave to appeal had been refused soon after conviction.

<sup>1</sup> Preface to Roscoe's *Criminal Evidence*, 14th edn., 1921.

<sup>2</sup> This is of extreme historic interest, as it is the sole relic of the writ of error (formally abolished by that Act),—probably the most cumbrous and costly form of criminal appeal ever known. It was very ancient, perhaps reaching back to Edward I., and it was the only way of taking a (criminal) point of law to the Lords; it was nearly always brought by an aggrieved defendant (cf. Short & Mellor, *Crown Office Practice*, 1st edn., 1890, p. 313) with the consent of the Attorney-General. It only applied to some error "apparent upon the record of the proceedings" (Stephen, 1 *Hist. Cr. L.* 308); in early times, when there were few who could read, and fewer still who could read Latin, that document was the object of an almost religious reverence, and hence by degrees was decorated by its worshippers with a bulk of superfluous ornament; in "the Claimant's" case in 1881 (*Castro's*, or *Orion's* or *Tichborne's* case, 6 *Ap. C.* 229) "the record was a parchment roll of monstrous size," most of the contents of which were "wholly unimportant." In 1844 Daniel O'Connell, convicted in the Queen's Bench, Ireland, of a seditious conspiracy, was liberated by the House of Lords on account of clear technical errors in the form of the indictment (11 *Cl. & F.* 157). On the same

Accordingly there have been such appeals on both "sides"; the Crown has occasionally revindicated its right to a prisoner whom the Appeal Court had released, and has occasionally failed to keep a conviction which that court had upheld.

## 71. Mercy

Mercy is to the criminal law what equity is to the common. When all legal resources have been exhausted, there still remains the privilege of the Crown—a happy survival from primitive times when the criminal was forfeited, like a prisoner of war, to the prince, whose power of life and death implied the lesser right of pardon (p. 235). To-day "the most amiable prerogative of the Crown" (Blackstone) is as highly organized as the machinery of punishment, and is supervised by the same department, viz. the Home Office,

ground Mr. Bradlaugh and Mrs. Besant were successful in the Court of Appeal in 1878; they had been sentenced for the publication of a once notorious book (*Bradlaugh v. The Queen*, 3 Q. B. D. 607). "The Claimant" failed both in the Court of Appeal and in the House of Lords.

In Ireland this writ is still available. In 1854, when Q. S. passed sentence of two years' penal servitude, having jurisdiction *only* to adjudge (a minimum of) four, *the Crown* brought this writ, but the wrong judgment was quashed and the defendant sent back to Q. S. (*R. v. Levy*, 6 Cox, C. C. 482). In 1866 the Crown brought before the court in the same way a lesser sentence than the law allowed, but as the record itself showed a grave illegality to the defendant's prejudice the court set aside the conviction altogether (*R. v. Maria Fox*, 15 W. R. 106; p. 292 n.<sup>2</sup>). Again the same point was raised by writ of error by the Crown in *R. v. T. O'Brien*, Ir. R. Com. L. 166, 1867, but the Court recommended even a lighter sentence than that appealed against. In 1890 a man sentenced to death for murder, at Assizes in Ireland, carried his appeal on grounds purely of legal informalities at the trial as far as the Court of Appeal, and though the legal points were decided against him his sentence was commuted to penal servitude for life (*O'Brien v. the Queen*, 26 L. R. Ir. 451).

which naturally consults the sentencing judge, or, since 1908, refers to the Court of Criminal Appeal when a case for review is suggested on behalf of the condemned.<sup>1</sup> But the royal right to pardon at discretion has not been in the least diminished by the creation of that tribunal, and it has often been exercised when those judges have rejected a petition. Moreover, the power of the minister may often be conveniently used, when, e.g. it is too late to apply to that court,<sup>2</sup> or a convict is discharged before his time on

<sup>1</sup> Absolute mistakes are very rare, but see p. 308. "It is stated by J. D. Lewis (*Causes célèbres de l'Angleterre*, p. 10 [1883]) that, after a wide study of English criminal trials from the times of James II., he had not found more than three cases in which any person had been (not merely sentenced, but) actually executed who had afterwards been proved quite innocent; viz. the clear cases of Shaw (executed at Edinburgh in 1721 for the supposed murder of a daughter, who had in reality committed suicide), of Jennings (executed at Hull in 1762 for theft by a mistake of identity), and the much more doubtful case of Eliza Fenning (executed in London in 1815 for a supposed attempt at poisoning). That of the innkeeper, Jonathan Bradford (executed in 1736 for the murder of a traveller), though a case of legal innocence, was one of moral guilt, as he had entered the traveller's room to kill him, but found him slain already by his own valet" (Kenny, *Outlines*, ch. xxxi.).

<sup>2</sup> Take these instances: Gas stokers were sentenced in 1872 to twelve months' hard labour for a (trade union) conspiracy; perhaps the law was strained against them; the sentence was reduced to four months, and the Act under which they were convicted was repealed.

Mr. Barber, a solicitor, was transported in 1844 for forgery, but pardoned in 1848; in 1859 the House of Commons voted him £5000 as compensation. In 1876 one Habron was convicted of a murder at Manchester, but on the confession of another man in February, 1879, was released in March, and awarded £1000 by Parliament (Hansard, Ap. 3, 1879). Edmund Galley was sentenced to death at Exeter for murder in 1836, but was transported. There can hardly be any doubt that he was innocent; in 1879, on an address from the House of Commons (Hansard, July 25, 1879) to the Crown, he was pardoned, but it does not appear that he was compensated. In 1901, a man, who had been brought in custody from New Zealand to Colchester on a charge of murder, which was dismissed by the magistrates, was awarded £600 by the Treasury (Kenny, C. 33). The case of Mr. Adolf Beck is still fresh in the public memory: p. 299 n.<sup>4</sup>.

account of permanent ill-health. The Crown is then "a magistrate . . . holding a court of equity in his own breast to soften the rigour of the general law, in such criminal cases as merit an exemption from punishment" (4 Blackstone, 396).

That this power is not the *personal* privilege of the sovereign may be seen from an incident in the reign of George IV. A gentleman of County Clare was sentenced to death for burning his house. The king, petitioned by "respectable inhabitants of the county," and "there being some favourable circumstances in his case," wrote directly to the Lord-Lieutenant of Ireland without taking the advice of any minister. The Lord-Lieutenant respited the man, but he, the Duke of Wellington, and Sir Robert Peel protested against the king's action, and the latter finally allowed the law to take its course.<sup>1</sup>

The effect of a pardon is, so far as possible, to put the recipient in exactly the same position as if he had not been convicted; all disabilities disappear. Thus, when a man was convicted of felony in May, 1883, and sentenced to seven years' penal servitude, but in November got a "ticket of leave," and in 1885 "a free pardon," it was held in 1890<sup>2</sup> that he could hold a spirit licence despite the enactment "that everyone convicted of felony shall *for ever* be disqualified from selling spirits by retail."

"Law . . . cannot be framed on principles of compassion to guilt: yet justice, by the constitution of England, is bound to be administered in mercy; this is promised by the King in his coronation oath" (Blackstone).

<sup>1</sup> Sir Robert Peel, by C. S. Parker, vol. ii., ch. vi.; for other instances of the king, who seems to have been very tender on this subject, being overruled, see vol. i., ch. ix.

<sup>2</sup> *Hay v. Justices of Tower Division*, 24 Q. B. D. 561.

We may end on this note—which harmoniously echoes the burden of these pages—that our law is an attempt to reach ideal justice. It fails most conspicuously by reason of its costliness. Perhaps some day some reader may help to remove this blot.

## Appendix

### ARBITRATION

Parties in civil actions may, if they choose, submit their differences to an arbitrator<sup>1</sup> or arbitrators, or to the latter and an umpire in case the arbitrators cannot agree, undertaking to be bound by the decision or "award" he or they may make. Or they may be compulsorily referred by the court, before which they are, to an officer of the court, the official referee, or a registrar, or to a referee, or to more than one upon whom the court allows them to agree, or, in default of such agreement, appoints, and courts generally take one of these courses in cases where the parties themselves usually resort to arbitration, i.e. where there is a mass of details or items or long accounts to be investigated, or the "ins and outs" of certain special businesses which only the initiated can be expected to know, figure prominently in the dispute. In the last case, many interests have organized their own local arbitration boards, e.g. in the City of London, which are easily set in motion, and decide speedily, and all are cases in which a jury could hardly be expected to follow all the details with any certainty, or a judge to give up an unfair amount of his time, though, of course, if there is any point of law he usually has to decide it, though even that may be left to the arbitrator. Many mercantile contracts provide that in case of dispute resort should be had to arbitration. The motive usually impelling parties to submit to arbitration is either to secure judges conversant by their calling with the kind of matter in

<sup>1</sup> The history of this word is interesting, meaning originally "one who goes to see"; it is used in early Latin=a witness; later a judge: *arottrari*= to think, is common.

controversy, or to get a *cheaper* and *speedier* decision than they expect in due course of law. On the other hand, they must provide for the remuneration of their chosen judges, which, of course, they have not to do in the case of a judge or an officer of the court.

A short Act of 1889 is practically a code on this subject. The hearing before the arbitrators is practically a miniature trial, with a little less formality. There is ample provision for enforcing the judgment, or, in a proper case, for setting it aside, on appeal, as, for instance, in the rare cases where partiality on the part of the arbitrator is alleged. It will not be set aside merely on the findings of fact, unless they are so perverse as to imply misconduct; in this respect the arbitrator is in the position of a jury.

The law itself, so to say, submits itself to arbitration in the great field of Workmen's Compensation, i.e. that which is awarded to a disabled workman, or, in the case of his death, to his dependents from the employer, in case of an accident during and arising from the employment. It is obvious that relief in such cases should be speedy and the procedure cheap, and to achieve that end the local County Court judge sits as an arbitrator between the parties and makes a money award and controls the distribution of it. These tribunals are very busy and have given almost universally satisfaction to both parties. On any point of *law*, however, arising there is an appeal to the law court.

It is practically impossible to refer purely criminal matters to arbitration, and it is rare in matters which may be the subject of either criminal or civil proceedings. Occasionally, by leave of the court, a not serious misdemeanour such as obstruction to a highway or nuisance is so referred, e.g. in 1832 *R. v. Moate* (3 B. & Ad. 237).

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